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In The

Supreme Court of the United States

October Term, 1998

ESTER V. PAFFORD, and THOMAS A. KRUDY,
Trustee in Bankruptcy for the
Estate of Ester V. Pafford,

Petitioners,

v.

ALEXIS M. HERMAN, Secretary of Labor,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Are there only two methods to prove discrimination: the direct evidence method or the *McDonnell Douglas* formula?

2. Is circumstantial evidence suggesting discriminatory animus part of the direct evidence method?

3. May circumstantial evidence suggesting discriminatory animus be considered in proving a prima facie case of discrimination under the *McDonnell Douglas* method?

4. When an employer offers a non-discriminatory reason, does the court focus on whether there is a prima facie case or on the ultimate issue of discrimination?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. Thomas A. Krudy, Trustee in Bankruptcy for the Estate of Ester V. Pafford, is a successor in interest to Ester V. Pafford. All references to petitioner refer to Ester V. Pafford and her successor in interest collectively.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Ester V. Pafford and Thomas Krudy, Trustee in Bankruptcy, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and it is reported at 148 F.3d 658. The opinion of the United States District Court appears at Appendix D to the petition and it is unpublished.

The date on which the United States Court of Appeals decided this case was June 2, 1998. A timely petition for rehearing was denied by the United States Court of Appeals on July 29, 1998, and a copy of the order denying rehearing appears at Appendix B.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This matter involves the enforcement of the Sections 703(a) and 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) and 2000e-3(a), and they are printed at App. 77.

STATEMENT OF THE CASE

New all-white management of the employer's Indianapolis office caused the termination of all minority investigators. The performance of all of the minority investigators was found by the employer to be satisfactory or above, and they all received promotions until the change to the all-white management. Two of the three minority investigators had achieved the highest grade for investigators in the office.

The all-white management encouraged the Hispanic investigator to resign, and he did so, taking a much lower grade position in another agency until he worked himself back up to the highest grade.

The all-white management encouraged Petitioner Pafford (Filipino) to resign by finding fault with her work when no such fault had been found by the prior management, by making false statements about her which were proven false by third party affidavits as well as petitioner's affidavit, and by harassing and humiliating her by various methods, including searching her for eight months every time she entered her federal office building at a time when no other federal employees were searched. When Ms. Pafford did not resign, and instead, requested leave without pay pursuant to doctor's excuses, which white investigators had been granted, her leave without pay was denied and she was terminated. When Ms. Pafford requested a transfer to an office which wanted Ms. Pafford, the white management in her old office refused to even consent to the transfer.

After Ms. Pafford was terminated, the all-white management terminated the remaining minority investigator, an African-American who had achieved the highest grade in the office. The all-white management terminated him just ten months before he would have qualified for full retirement.

The evidence presented in eleven affidavits stated that the minority investigators acted professionally, and that their performance was criticized only after the all-white management was selected. Also, white employees who had performance problems were granted downgrades, transfers, disability retirement, and leave without pay for more than a year. The minority investigators were not granted any of these opportunities. The court of appeals stated that Ms. Pafford did not request a downgrade, but she was not given the opportunity, nor were the other minority investigators. When Ms. Pafford requested a transfer and when she requested leave without pay, she was denied.

A summary of the adverse actions against the minority employees and the favorable actions granted to white employees is shown by the list of investigators below.

Johnson Beaven, District Director, Retired in 1989
Connie Klipsch, Assistant District Director,
White
Became District Director in 1989
Aquila W. Crawford, GS-12 Compliance Officer,
African-American
Terminated as incompetent just ten months before full retirement

Mandujano N. Garcia, GS-12 Compliance Officer, Hispanic-American
Klipsch suggested he leave, and he went to another agency to get away from the discriminatory environment of the Indianapolis DOL office

Carol (Garvey) Atkinson, Compliance Officer, White
Allowed to downgrade to Assistant

Jane Hooton, Compliance Officer, White
Promoted to Assistant District Director

Ester V. (Jaranilla) Pafford, Compliance Officer, Asiatic/Pacific Islander, Filipino
Terminated after filing discrimination complaint

Kenneth Morrison, Compliance Officer, White
Promoted to Assistant District Director

Edith McCullough, Compliance Officer, White
Promoted to GS-11

Jill Cousert, Compliance Officer, White
Promoted to GS-11

Judy Glazier, Compliance Officer, White
Promoted to GS-11 and operating the Blue Bird Bliss bed and breakfast

Peter Engelke, Compliance Officer, White
Transferred

Pam Frazee, Compliance Officer, White
Recommended for promotion to GS-11

Charles McCormick, Compliance Officer, White
Granted more than a year of LWOP and disability retirement

David Filbey, Student Co-op Investigator, White
Promoted to Compliance Officer and later allowed to downgrade to Assistant

Alice Hertli, Compliance Officer, White, Evansville Field Office
Still employed

Linda Stalion, Compliance Officer, White, Evansville Field Office
Terminated only after more than a year of allowed LWOP, release by her doctor, and notice to return to work before she was terminated
Don Scott, Compliance Officer, White, New Albany Field Office
Still employed
Secretary, Minority
Still employed

Appellant's Appendix (AA) in Court of Appeals, AA-97-98, 139, 141, 163, 165, 196-218, 230-231, R. 97, Pl. Exs. 41-44. The only minority kept by the all-white management was a minority for the lowest position in the office, secretary.

The DOL submitted affidavits from two witnesses as follows:

1. Connie Klipsch, J. District Director of the Indianapolis office. AA-196, 219, 221.

2. Raymond A. Wyzguski, Acting District Director and Assistant District Director of the Indianapolis office. AA-225, 233.

The non-moving party, Ms. Pafford, submitted affidavits from herself and ten other witnesses. The other witnesses included witnesses from both inside the Indianapolis DOL office and from outside the office. The

other witnesses included both minority witnesses and white witnesses as follows:

1. Ester V. Pafford, Wage and Hour Compliance Specialist (Filipino). AA-47.

2. Thomas Clumb, owner of Avtec Corporation. AA-102.

3. Sahr Nyorkor, owner of S & K Laundromat & Dry Cleaning, Inc. AA-105.

4. Katherine Katz, Sec.-Treas. of S-K General Contracting Co., Inc. AA-106.

5. Lisa Tutman, television news reporter for WISH-TV in Indianapolis. AA-108.

6. Charles O. McCormick, Wage and Hour Compliance Specialist (White). AA-111.

7. Aquila W. Crawford, Wage and Hour Compliance Specialist (Af.-Am.). AA-132.

8. Mandujano N. Garcia, Wage and Hour Compliance Specialist (Hisp.). AA-160.

9. Robert E. Pafford, husband of plaintiff and Federal Protective Service police officer (White). AA-167.

10. Henry M. Proffitt, Federal Protective Service police officer. AA-188.

11. Joe L. Oyler, Sergeant Major in the Army Reserves and businessman. AA-193.

Testimony was presented from each of the minority investigators about the difference in treatment of themselves and white investigators after the all-white management was selected by the employer. The witnesses

outside the office confirmed the harassing treatment given by the management to Ms. Pafford and the false statements made about Ms. Pafford by the management.

The opinion of the court of appeals recognized that "some of the foregoing evidence suggests discriminatory animus," but the court of appeals refused to consider the evidence for a prima facie case of discrimination in the Court's *McDonnell Douglas* method of proving a prima facie case. *Pafford v. Herman*, 148 F.3d 658, 666 (7th Cir. 1998).

The opinion of the court of appeals first stated that a plaintiff has two methods of proof available, the direct method and the indirect method. The indirect method was also called the *McDonnell Douglas* method. The court of appeals then stated that circumstantial evidence is included in the direct method of proof. Before evidence can qualify as direct evidence of intent, it must be in the nature of an admission. The court of appeals stated as follows:

> "A plaintiff trying to defeat an employer's motion for summary judgment has two methods of proof at his or her disposal. Under the 'direct' method, the plaintiff may show (either through direct or circumstantial evidence) that the employer's decision to take the adverse job action was motivated by an impermissible purpose, such as race or national origin. *See Wallace v. SMC Pneumatics, Inc*, 103 F.3d 1394, 1397 (7th Cir. 1997); *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994). Under the 'indirect' burden-shifting method, the plaintiff may raise an inference of discrimination by offering sufficient evidence to establish a prima facie case.

See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973)."

App. 13; 148 F.3d at 665. The opinion of the court of appeals found the circumstantial evidence in this case not sufficient for the direct method. Having considered the circumstantial evidence under the direct method, the court of appeals refused to consider the circumstantial evidence under the *McDonnell Douglas* method for a prima facie case.

The court of appeals held that circumstantial evidence suggesting discriminatory animus could only be considered under the *McDonnell Douglas* method to determine pretext, not to determine a prima facie case. The court of appeals held that circumstantial evidence suggesting discriminatory animus could be used under *McDonnell Douglas* to prove "the ultimate fact of discrimination," but not a prima facie case under *McDonnell Douglas*. App. 12; 148 F.3d at 666. The court of appeals required that plaintiff first prove a prima facie case of discrimination through the *McDonnell Douglas* formula before the court could consider circumstantial evidence suggesting discriminatory animus under *McDonnell Douglas*. The court of appeals held that plaintiff did not prove a prima facie case of discrimination under the *McDonnell Douglas* formula, so the courts below could not consider circumstantial evidence suggesting discriminatory animus for a prima facie case of discrimination under the *McDonnell Douglas* method.

The opinion of the court of appeals stated the facts and its reasoning on the *McDonnell Douglas* method as follows:

"Pafford's circumstantial evidence of discrimination against minority employees consists of the following: after Klipsch became the District Director, no minority employees were hired and none were promoted, and all of the minority employees – Pafford (Filipino), Aquila Crawford (African American), and Mandujano Garcia (Hispanic) – were terminated or resigned; Klipsch told someone in the office that the reason she lived on the south side of Indianapolis was to be 'away from the black people'; at a retirement party Klipsch served cake in a friendly manner to Caucasian guests, but 'threw the cake down on the table with an unfriendly look on her face' when she served Pafford and other minority guests; at an office picnic hosted by Charles McCormick (Caucasian), Klipsch and her family would not eat the tortillas brought by Garcia and when Garcia asked Klipsch why, she allegedly said 'in a low, serious voice . . . that she did not trust him'; and Hooton wrote a memorandum to Pafford's personnel file regarding alleged complaints from an employer investigated by Pafford, but the alleged complaints were later contradicted by affidavits from the employer and Pafford.

"Even if the trier of fact believed all of this evidence, it would not be sufficient to establish discrimination on the basis of Pafford's race and national origin. While some of the foregoing evidence suggests discriminatory animus, it still fails to meet the standard required to defeat the DOL's motion for summary judgment. Thus, the *McDonnell Douglas* test is indeed the appropriate method of proof in this case. Pafford's circumstantial evidence was not presented in vain, however, for it can be used at the pretest stage

of the *McDonnell Douglas* test to demonstrate the ultimate fact of discrimination. *See Perdomo v. Browner*, 67 F.3d 140, 146 (7th Cir. 1995). Bearing this in mind, our task is to determine whether Pafford has come forward with sufficient evidence from which the trier of fact could reasonably infer that the DOL denied her training or promotion on the basis of her race or national origin, or subjected her to retaliation for filing a charge of discrimination and later a lawsuit based on that charge.

"C. Pafford's Claims

"On appeal, Pafford's various factual arguments involve one legal principle – that in resolving a motion for summary judgment, the district court must view the evidence in the light most favorable to the non-movant. Pafford contends that the district court not only failed to apply this standard, but also ignored her evidence of discrimination. In large part, this argument is aimed at the district court's failure to discuss her circumstantial evidence of disparate treatment. As previously noted, this evidence alone falls short of establishing a prima facie case of discrimination, but could be used to demonstrate pretext under the *McDonnell Douglas* test. For reasons explained below, we agree with the district court that Pafford has failed to come forward with sufficient comparative evidence to demonstrate a prima facie case of discrimination. The district court thus did not need to reach the pretext issue or Pafford's circumstantial evidence. *See Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1179-80 (7th Cir. 1997). We now turn to Pafford's remaining arguments."

App. 14-17; 148 F.3d at 666-667 (footnotes omitted). The court refused to consider circumstantial evidence suggesting discriminatory animus to prove a prima facie case of discrimination in the *McDonnell Douglas* method, when the whole purpose of the *McDonnell Douglas* method is to raise an inference of discrimination.

The court of appeals also ignored many of the facts favorable to the non-movant, such as the very important fact that Ms. Pafford was not hired by the new District Director, Connie Klipsch. Ms. Pafford was hired by the former District Director, Johnson Beaven. AA-47. Ms. Klipsch as Assistant District Director attended Mr. Beaven's interview of Ms. Pafford, but Ms. Klipsch expressed no interest in hiring Ms. Pafford. AA-47. While Johnson Beaven supervised Ms. Klipsch and Ms. Pafford, Ms. Pafford had no serious performance problems. When he announced his retirement and Ms. Klipsch selected supervisors who were all white, the all-white management criticized the minority investigators and caused the termination of them all.

The court of appeals opinion stated that Ms. Pafford did not offer evidence of white employees similarly situated, but Ms. Pafford offered evidence of every investigator in her office and compared herself to the white employees who had the same grade, who had less seniority, and who worked at the same job in the same office as Ms. Pafford.

REASONS FOR GRANTING THE WRIT

1. The position that there are only two methods of proving a prima facie case of discrimination, the direct method or the *McDonnell Douglas* formula, is contrary to *U.S. Postal Service Bd. of Governors v. Aikens*.

The Seventh Circuit has excluded consideration of circumstantial evidence in the indirect method, which it calls the *McDonnell Douglas* method. By not permitting circumstantial evidence to be considered for a prima facie case under the indirect method, and by looking only at the *McDonnell Douglas* formula, the Seventh Circuit has improperly limited the ways to prove discrimination.

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) held that direct evidence of discrimination is not necessary for a prima facie case, and that circumstantial evidence may be considered for a prima facie case. *McDonnell Douglas* gave four facts which are an example of a set of circumstantial evidence which raise an inference of discrimination for a prima facie case. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977). The method suggested in *McDonnell Douglas* for pursuing this inquiry was never intended to be rigid, mechanized, or ritualistic. *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577-580 (1978). The Court has said that the facts will necessarily vary in Title VII cases, and the prima facie proof required from respondent is not necessarily applicable in every respect in differing factual situations. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 n. 6 (1981).

The four facts have sometimes been called the *McDonnell Douglas* "formula." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 270 (1989); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 118 (1985). However, it is not a mandatory formula which must be used in every case, but rather a permissible formula. It is an example of circumstantial evidence of discriminatory intent, not a requirement for all circumstantial evidence of discriminatory intent. The Seventh Circuit has restricted the evidence possible in the indirect method to the one example used by the Court.

"As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n. 3 (1983). "But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact." *Id.* at 716. The circumstantial evidence in a discrimination case is no more limited to one set of facts than in any other lawsuit.

The Court specifically recognized that the consistent promotion of white persons over a black person, a good past performance record before the discrimination, and derogatory comments about blacks can be considered as evidence in determining a prima facie case of discrimination. *U.S. Postal Service*, 460 U.S. 713 n. 2.

By limiting employees to only two methods proving a prima facie case of discrimination and excluding evidence suggesting discriminatory animus from the indirect method, the Seventh Circuit has made it more difficult to prove a discrimination case than other cases. We do not tell prosecutors that there are only two ways to prove

criminal intent or exclude evidence suggesting criminal intent from a prima facie case. It is more difficult for a person in the Seventh Circuit to prove a prima facie case of discrimination than for a prima facie case of a crime to be proven against him.

The Court has attempted to illustrate that the *McDonnell Douglas* method is only an example of circumstantial evidence, but the Court has not clearly stated this principle. Instead, the Court has stated that the formula may "vary." *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802 n. 13; *Furnco Const. Corp. v. Waters*, 438 U.S. at 575. Recent decisions of the Court have varied the formula without stating that all circumstantial evidence is admissible for a prima facie case. *O'Connor v. Consolidated Coin Caterers Corp., supra,* (replacement outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (employee was not required to make showing that she was better qualified than the person chosen for the position in order to establish that the employer's claim was pretextual). The Seventh Circuit in this case has given the Court the opportunity to make the statement that circumstantial evidence of a prima facie case of discrimination is not limited to a formula. The methods of proof are not limited to the direct method or the *McDonnell Douglas* formula, and other circumstantial evidence may be considered for a prima facie case of discrimination.

Direct evidence of discrimination is hard to come by. *Price Waterhouse v. Hopkins*, 490 U.S. at 271 (O'Connor, J., concurring). There will seldom be 'eyewitness' testimony as to the employer's mental process. *United States Postal*

Serv. Bd. of Governors v. Aikens, 460 U.S. at 716. The most common method of proving discrimination is by circumstantial evidence. By limiting the methods of proof of a prima facie case of discrimination to the direct method and the *McDonnell Douglas* formula, the Seventh Circuit has severely restricted the most common form of proof of a prima facie case of discrimination.

The Court has already stated that the evidence of pretext may take a variety of forms. *Patterson v. McLean Credit Union*, 491 U.S. at 187. An employee "may not be forced to pursue any particular means of demonstrating that respondent's stated reasons are pretextual." *Id.* at 188. The Court now has the opportunity to state the same holding for the less onerous proof of a prima facie case.

The burden for a prima facie case is not supposed to be onerous. *Id.* at 186. It is not supposed to be more difficult to prove a prima facie case than the ultimate issue. Proof for a prima facie case is supposed to be "infinitely less" than what a directed verdict demands. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 515 (1993). The Seventh Circuit position makes the prima facie evidence more limited than the evidence on the ultimate issue. The Seventh Circuit position makes the prima facie case more onerous than proof of the ultimate issue.

2. The position that circumstantial evidence is included in the direct method is contrary to *McDonnell Douglas* and the Court's decisions interpreting *McDonnell Douglas*.

The direct method of proof is by direct evidence. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. at 121; *U.S.*

Postal Service Bd. of Governors v. Aikens, 460 U.S. at 714 n. 3; *Price Waterhouse v. Hopkins*, 490 U.S. at 270-272. Circumstantial evidence is not direct evidence. *U.S. Postal Service*, 460 U.S. at 714 n. 3; *Wyatt v. Cole*, 504 U.S. 158, 174 (1992); *Siegert v. Gilley*, 500 U.S. 226, 231 (1991); *Chasson v. Ponte*, 459 U.S. 1162, 1164 n. 2 (1983). Circumstantial evidence is not included in the direct evidence method.

Before evidence is sufficient to be direct evidence, it must be in the nature of eyewitness testimony as to the employer's mental process, meaning an admission by the employer. See *United States Postal Service*, 460 U.S. at 716. Circumstantial evidence is evidence from which intent must be inferred from conduct. *Metropolitan Edison Co. v. N.L.R.B.*, 460 U.S. 693, 701 (1983). Thus, the standard of proof for direct evidence of intent is high – an admission is required. When circumstantial evidence does not include an admission, it naturally fails to prove a prima facie case of discrimination under the direct method. The error in this regard in the opinion below is that circumstantial evidence is not included in the direct evidence method.

The position of the Seventh Circuit that in order to be sufficient for a prima facie case, circumstantial evidence must be considered in the direct evidence method raises the standard for proof of a prima facie case. Forcing circumstantial evidence to be judged by the direct evidence standard denied Ms. Pafford the right to have her circumstantial evidence considered under the circumstantial evidence method, which does not require an admission of liability. The refusal to consider circumstantial evidence for a prima facie case under the indirect method has the effect of raising the legal standard. See, *U.S. Postal*

Service, 460 U.S. at 716; *Allentown Mack Sales And Service, Inc. v. N.L.R.B.*, ___ U.S. ___, 118 S.Ct. 818, 826 (1998).

After the *Pafford* decision, the Seventh Circuit reaffirmed its position that circumstantial evidence is part of the direct evidence method, and it quoted the statement in *Pafford* that the direct evidence method includes circumstantial evidence. *Ciani v. Pettibone Corp.*, 152 F.3d 723, 727 (7th Cir. 1998). In that case, the court found that the supervisor's remark stated on several occasions that the employee was getting too old for the job was not sufficient to prove direct evidence of age discrimination, and again required that the fourth factor in the "*McDonnell Douglas* indirect method" consist of proof that similarly situated younger employees were treated more favorably. 152 F.3d at 727-728.

The Eleventh Circuit is the only other known circuit to have taken the same position as the Seventh Circuit. In the case of *Jones v. Bessemer Carraway Medical Center*, 137 F.3d 1306, 1331 (11th Cir. 1998), the plaintiff's supervisor made statements a week before plaintiff was terminated, such as "You black girls make me sick," which the Eleventh Circuit found were evidence of racial animus. However, the Eleventh Circuit held that statements of racial animus of a supervisor are not evidence of a prima facie case of discrimination. 137 F.3d at 1396. On rehearing the Eleventh Circuit vacated that part of its original opinion, and like the Seventh Circuit, stated at footnote 11 that such evidence could be evidence of pretext:

> "11. Direct evidence is evidence which, if believed, proves the existence of the fact in issue without inference or presumption. So, direct evidence of discrimination is powerful evidence

> capable of making out a prima facie case essentially by itself. This court has marked severe limits for the kind of language to be treated as direct evidence of discrimination. *See, e.g., Evans v. McClain of Georgia, Inc.*, 131 F.3d 957, 962 (11th Cir. 1997); *Burrell v. Board of Trustees of Georgia Military College*, 125 F.3d 1390, 1393-94 n. 7 (11th Cir. 1997); *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1082 (11th Cir. 1990). To give great weight – for example, to say a few isolated words 'make all the difference' – to language that is, at best, only circumstantial evidence blurs the important distinction between circumstantial evidence and direct evidence for prima facie cases. Blurring this distinction adds hurtful uncertainty to the law.
>
> "Language not amounting to direct evidence, but showing some racial animus, may be significant evidence of pretext once a plaintiff has set out the prima facie case. *See Smith v. Horner*, 839 F.2d 1530, 1536-37 (11th Cir. 1988); *see also E.E.O.C. v. Our Lady of the Resurrection Medical Ctr.*, 77 F.3d 145, 149 (7th Cir. 1996); *Woody v. St. Clair Comm'n*, 885 F.2d 1557, 1560 (11th Cir. 1989)."

151 F.3d 1321, 1323 n. 11.

3. The position that circumstantial evidence suggesting discriminatory animus may not be considered under the *McDonnell Douglas* method is contrary to *McDonnell Douglas*, because the purpose of the *McDonnell Douglas* method is to raise an inference of discrimination.

The *McDonnell Douglas* indirect method is not limited to one formula of four facts, as the Seventh Circuit has

done. The whole purpose of the *McDonnell Douglas* method using four facts or other facts is to raise an inference of discrimination. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. at 312; *Price Waterhouse*, 490 U.S. at 270-271.

The purpose of raising an inference of discrimination is to prove "the ultimate fact of discrimination." When the Seventh Circuit prevents the consideration of evidence suggesting a discriminatory animus from a prima facie case, but states that such evidence may be considered later to prove "the ultimate fact of discrimination," the Seventh Circuit prevents the employee from proving her prima facie case, and thereby, her ultimate fact of discrimination. The Seventh Circuit limits the evidence at the prima facie case stage and cuts off the employee's case. The unfairness to minorities is obvious. If the evidence is admissible to prove "the ultimate fact of discrimination," it is admissible to prove the lesser standard of the prima facie case.

Whereas *U.S. Postal Service* has recognized the different types of circumstantial evidence which can prove a prima facie case, other courts of appeal, cognizant of this Court's decisions allowing them to "vary" the formula, have allowed circumstantial evidence under the fourth element of the *McDonnell Douglas* formula.

The Second Circuit has recognized that the fourth factor of a prima facie case may be proven by circumstances giving rise to an inference of discrimination. *Austin v. Ford Models, Inc.*, 149 F.3d 148, 154 (2nd Cir. 1998); *Woroski v. Nashua Corporation*, 31 F.3d 105, 108 (2nd Cir.

1994); *Lopez v. Metropolitan Life Ins. Co.*, 930 F.2d 157, 161 (2nd Cir.), *cert. denied*, 502 U.S. 880 (1991).

The *Pafford* decision cited the Second Circuit's *Lopez* decision, but limited the circumstantial evidence to "*i.e.*, that she was denied training given to other similarly situated employees who were not members of the protected group." App. 18; 148 F.3d at 667. The decision stated that the white employees in the same grade in the same job in the same office with less experience were not similarly situated, without giving any reason and refused to consider the other circumstantial evidence. Of course, the decision had already previously specifically denied consideration of other circumstantial evidence.

On the failure to promote issue, the *Pafford* decision also stated that other evidence could be considered, but the decision had previously specifically denied consideration of other circumstantial evidence. App. 23; 148 F.3d at 669. The specific denial by the Seventh Circuit of consideration of circumstantial evidence for a prima facie case under the indirect method is erroneous.

After finding a prima facie case of discrimination in Ms. Pafford's termination, the Seventh Circuit refused to consider the circumstantial evidence even on the issue of pretext, indicating that the Seventh Circuit's confusion of the procedures is denying relief to minorities. App. 29-30; 148 F.3d 671-672.

Other circuits have recognized the consideration of other circumstantial evidence under the fourth factor of the *McDonnell Douglas* formula under terms such as "proof of circumstances that raise a reasonable inference of unlawful discrimination." *Runnebaum v. NationsBank of*

Maryland, N.A., 123 F.3d 156, 164, 175 (4th Cir. 1997) (en banc); *Tanik v. Southern Methodist University*, 116 F.3d 775, 776 (5th Cir.), *cert. denied*, 118 S.Ct. 600 (1997); *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 350 (6th Cir. 1998); *Hanenburg v. Principal Mutual Insurance Co.*, 118 F.3d 570, 574 (8th Cir. 1997); *Cordova v. State Farm Ins. Companies*, 124 F.3d 1145, 1149 (9th Cir. 1997); *Martin v. Nannie and the Newborns*, 3 F.3d 1410, 1417 (10th Cir. 1993).

Whether independent of the *McDonnell Douglas* factors or as a part of the *McDonnell Douglas* factors, this Court and a majority of the circuits have recognized that other circumstantial evidence may be considered in the *McDonnell Douglas* indirect method of proof of a prima facie case, contrary to the Seventh Circuit.

4. When an employer offers a non-discriminatory reason, the Seventh Circuit erroneously focuses on the question of a prima facie case rather than on the question of discrimination, contrary to *U.S. Postal Service Bd. of Governors v. Aikens.*

The Seventh Circuit takes the position that when an employer offers a non-discriminatory reason for its employment action, the courts must focus on the prima facie case before focusing on the ultimate question of discrimination. The Seventh Circuit position is directly contrary to *U.S. Postal Service Bd. of Governors v. Aikens*, *supra*, which stated as follows:

> The District Court erroneously thought that respondent was required to submit direct evidence of discriminatory intent, see n. 3, *supra*, and erroneously focused on the question of

> *prima facie* case rather than directly on the question of discrimination.

460 U.S. at 717. The Seventh Circuit has continued to violate the Court's decision by artificially limiting the evidence for a prima facie case and then concentrating on the artificially limited evidence, instead of considering all of the evidence on the ultimate question of discrimination.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 27, 1998

In The
United States Court of Appeals
for the Seventh Circuit

No. 96-4241

ESTER V. PAFFORD and THOMAS A. KRUDY,
Trustee in Bankruptcy for the Estate of
Ester V. Pafford,

Plaintiffs-Appellants,

v.

ALEXIS M. HERMAN, Secretary of Labor,[1]

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 92-1178-C-B/F – **Sarah Evans Barker**, *Chief Judge.*

ARGUED NOVEMBER 4, 1997 – DECIDED JUNE 2, 1998

Before POSNER, *Chief Judge*, and COFFEY and ROVNER, *Circuit Judges.*

COFFEY, *Circuit Judge.* Ester V. Pafford, formerly a Wage and Hour Compliance Specialist ("Wage-Hour Investigator") in the Wage and Hour Division of the Indianapolis District Office of the United States Department of Labor, filed suit against the Department of Labor under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

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[1] The current Secretary of Labor, Alexis M. Herman, is substituted for Robert Reich as the named defendant. Fed. R. App. P. 43(c).

§ 2000e *et seq.*, claiming denial of training and promotion from a GS-9 to a GS-11[2] based on her race (Filipino) and national origin (Philippines), and retaliation. Pafford also sought review of the Merit Systems Protection Board's decision affirming her termination. The district court granted summary judgment in favor of the Department of Labor and Pafford appeals. We affirm.

I. BACKGROUND

The Wage and Hour Division of the Department of Labor (the "DOL") enforces employer compliance with federal laws governing employee wage rates, working hours, and fringe benefits. An employer often comes under the scrutiny of the DOL in response to an employee's complaint, which is investigated by a Wage-Hour Investigator. Cases involving "common types of clear-cut violations" of federal labor laws are assigned to GS-9 investigators, whereas "cases involving substantial difficulty, requiring resourcefulness in establishing facts and a need for judgment in interpreting and applying the laws" are assigned to GS-11 investigators.

In June 1987 Pafford, a Filipino female, was hired as a GS-7 Wage-Hour Investigator in the Wage and Hour Division of the Indianapolis District Office of the DOL. Connie Klipsch (Caucasian), the Assistant District Director and Pafford's direct supervisor, promoted Pafford from a GS-7 to a GS-9 in September 1988. Although Klipsch

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[2] The term "GS" is the abbreviation for "General Schedule" and indicates the level of pay for salaried government employees. 5 U.S.C. § 5332.

began supervising Pafford when she was hired in 1987, Pafford alleges that it was not until Klipsch was promoted to District Director in 1989 that the discrimination began.

Pafford's Performance

As a GS-9 investigator, Pafford was expected to "independently complete" cases assigned to her, which involved developing the necessary information by interviewing employers and employees, analyzing the pertinent business records, and determining the wage and hour laws applicable to the facts of the case; computing back pay owed by the employer to his or her employees; and negotiating directly with the employer's representative to recover back pay and ensure future compliance.

Pafford consistently received within-grade pay increases and annual performance reviews rating her performance as satisfactory on a scale of "outstanding," "highly effective," "satisfactory," "minimally satisfactory," and "unacceptable." However, she was advised of various performance deficiencies along the way. For example, in March 1989 Klipsch rated Pafford's performance as satisfactory, but according to Klipsch's memorandum to the file, Klipsch informed Pafford that she was spending too much time resolving individual cases. Klipsch advised Pafford that although she would be eligible for promotion to GS-11 in the Fall based on her length of service as a GS-9, Klipsch did not believe Pafford would be ready for the promotion. According to the memorandum, Pafford agreed and requested more time to improve her performance before being considered for

promotion. As anticipated, Klipsch did not recommend Pafford's promotion in the Fall of 1989 allegedly because Pafford was still experiencing difficulty working independently, frequently requesting assistance from her colleagues and Klipsch.

In June 1989 Klipsch was promoted to District Director of the Indianapolis District Office, and Raymond Wyzguski was assigned to the office as Assistant District Director. In this position, Wyzguski supervised Pafford from August 1989 until February 1991, during which time he also declined to recommend Pafford for promotion to GS-11. He attested that although Pafford received satisfactory performance ratings, "her performance was at the low end of successful, and in some cases, below that level." According to Wyzguski, Pafford was having difficulty performing at the GS-9 level; he claims to have trained and retrained her in Fair Labor Standards Act ("FLSA") policies, interpretations, and investigation procedures, and maintains that he did not assign Pafford to more complex cases involving other laws because she had not mastered the FLSA.

Suspension and Leave Restriction

Pafford received another new supervisor in February 1991 when Jane Hooton was promoted to Assistant District Director, replacing Wyzguski. Wyzguski had been designated as the Temporary District Director in November 1990 because Klipsch had become the Quality Advisor, and from January 1, 1991 until December 2, 1991, she worked out of an office on the south side of Indianapolis.

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Pafford took a leave of absence from April through early July 1991. Shortly after her return, she received notice of her proposed suspension and was placed on a leave restriction. On July 18, Hooton gave Pafford notice of her proposed suspension (1) for attempting to sell Amway products to the employees of a company she was investigating, (2) for failing to obtain approval for outside employment, and (3) for breaching the DOL's policy of confidentiality by not keeping files within her exclusive control (she left files at her mother-in-law's house) and by allowing a complainant to listen to Pafford's telephone conversation with the complainant's employer. In October 1991, after considering Pafford's response to her proposed suspension, Wyzguski suspended Pafford for fifteen days for the reasons set forth above.

In addition to the suspension, Hooton placed Pafford on a six-month leave restriction due to her "extensive leave usage and unplanned absences" between June 1990 and July 1991. In the course of a single year, Pafford had used 266 hours of annual leave, 98 hours of sick leave, and 255 hours of leave without pay – the majority of which was unscheduled – for a total of 77 days. Pafford worked a full 80-hour pay period only nine times (out of a possible 26) in 1990, and only five times in 1991. Hooton admonished Pafford that she would be charged as absent without leave for failure to comply with the conditions of the leave restriction[3] and that excessive absences without

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[3] Pursuant to the leave restriction, Hooton required Pafford to schedule all future leave in advance and provided that any additional unscheduled absences would not be approved other than for an emergency, which would be determined by Hooton.

leave could subject her to disciplinary action up to and including termination.

Approximately two weeks after receiving the leave restriction, Pafford filed an informal charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), which was followed by a formal charge about two weeks later. In her formal charge, she alleged that four Caucasian employees hired after her were "developed and upgraded to GS-11," an opportunity she claimed to have been denied because of her race, color, national origin, and age (fifty-five).

Weapons Screening

Around the time of Pafford's suspension in the Fall of 1991, Hooton told Wyzguski that she was concerned about her safety because of Pafford's behavior. Wyzguski thereafter decided that Pafford should be screened for weapons upon her entry into the federal courthouse where the DOL was located. Although everyone who entered the courthouse was required to pass through the metal detector, employees normally were not stopped even if the alarm sounded. After the weapons screening was instituted, if the metal detector alarm sounded when Pafford walked through, the officers would wave a hand-held metal detector over her body.

Hooton further advised Pafford that due to the deleterious effect of Pafford's absences on the office, advance leave would no longer be granted and leave without pay would no longer be approved. For any absences due to illness or medical appointments, Hooton required Pafford to submit a medical certificate meeting certain requirements, which were listed.

Wyzguski submitted a declaration in which he stated that his decision to screen Pafford for weapons was based on the following: his previous referral of Pafford to the Employee Assistance Program for counseling due to her "apparent emotional difficulties"; Pafford coming into his office several times crying about the fact that her son and husband were serving in the Gulf War and her fear that her husband was having an affair; her statement that she had contemplated suicide; the rumor that Pafford owned a gun and carried it with her or on her person; recent news accounts of workplace violence; and Pafford's performance problems, current suspension, and leave restriction. Wyzguski revoked the screening order after about one week.

Wyzguski subsequently spoke with Klipsch, who at the time was still working outside the Indianapolis office but was expected to return to the office shortly as District Director. Wyzguski told Klipsch that he had requested the Marshals Service to screen Pafford for weapons, but that he had halted that screening. At Klipsch's request, Wyzguski provided Klipsch with all the information he had relied upon when he ordered the screening. Klipsch stated that after receiving all the information and considering the safety of the employees at the Indianapolis office, she telephoned Dick McMahon, the Deputy Regional Administrator in Chicago, and discussed her concerns with him. Shortly thereafter, McMahon telephoned Wyzguski and ordered the screening reinstated. On November 27, 1991, Wyzguski asked the Marshals Service to resume screening Pafford.

Performance Improvement Plan

Upon Klipsch's return to the Indianapolis office in early December 1991, she met with Hooton and Wyzguski on a number of issues, including Pafford's performance. Hooton stated that Pafford was continuing to experience problems applying the law. To improve Pafford's performance, Klipsch directed that Pafford complete a training package used for new investigators and re-take an earlier training package on the 1989 amendments to the wage and hour laws.

On January 30, 1992, Hooton extended Pafford's leave restriction for another six months due to her continued absences. Following the imposition of the July 30, 1991 leave restriction, Pafford was absent without leave seven times for a total of 51.5 hours.

On May 28, 1992, Ken Morrison, who replaced Hooton as Pafford's supervisor, placed Pafford on a Performance Improvement Plan ("PIP"). The PIP identifies the primary deficiencies in Pafford's performance as the quality of her performance and effective case hour management. To achieve a satisfactory rating in the quality of performance category, 80-92% of Pafford's case investigations had to be acceptable upon their first submission to her supervisor. However, six of the last eight investigations submitted by Pafford proved to be unacceptable. With respect to effective case hour management, 92-97% of the investigations had to be completed in a manner that supports the amount of time expended. Three of Pafford's last eight investigations were unacceptable in this category. Pafford was given ninety days to improve her performance, and was advised that her failure to do

so could result in reassignment, reduction in grade, or termination.

On July 9, 1992, Pafford was absent from work and her husband delivered to Morrison a request for 520 hours of sick leave. Pafford submitted medical documentation in support of this request, including a letter dated June 26, 1992, from Dr. John Steenbergen stating that he had advised Pafford to take a leave of absence to reduce her stress level, and a certificate dated July 7, 1992, from Dr. S. Schmidt-Burke stating that Pafford could return to work when released by Dr. Steenbergen.[4] According to Morrison, the medical certificates submitted failed to comply with the requirements set forth in Pafford's leave restriction. The restriction required Pafford to support all leave due to illness with a medical certificate from a licensed physician stating the period of time Pafford was under the physician's care, her diagnosis, her prognosis for a full recovery, the expected time for recovery, any special precautions that should be taken upon her return to work, and whether her illness was chronic or recurring.

Morrison denied Pafford's request for a three-month leave of absence because she had used all of her sick leave and, under the terms of her leave restriction, she could not be granted advanced leave or leave without pay. Morrison advised Pafford that she would be charged as absent without leave ("AWOL") until she returned to work. Notwithstanding this warning, she did not return.

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[4] Dr. Steenbergen was Pafford's regular physician; in his absence from the office, Pafford was referred to Dr. Schmidt-Burke.

At the end of July, Morrison extended Pafford's leave restriction for another six months due to her continued unscheduled absences – 108 hours of AWOL since the leave restriction was extended in January 1992 – and reminded her that further absences could lead to disciplinary action including termination.

Denial of Transfer and Termination

On September 2, 1992, Morrison sent Pafford notice of her proposed removal based on her AWOL status and her failure to follow instructions. The latter charge concerned Pafford's failure to adhere to Morrison's prohibition on her working at home, her failure to comply with the medical documentation requirements imposed by the leave restriction, and her failure to provide case files to Morrison upon his request.

Notwithstanding the notice of proposed removal, on September 27, 1992, Pafford requested an additional 512 hours of sick leave. In support of this request, she submitted a letter dated September 3 from Dr. Steenbergen, stating that Pafford should take another three months of leave from her job to reduce her stress level. The record does not reflect that Morrison responded to this request in writing. However, on October 28, 1992, Klipsch approved Pafford's termination effective November 6, 1992. Pafford appealed her removal to the Merit Systems Protection Board ("MSPB"), and her termination was affirmed.

Meanwhile, on October 2, after Pafford received notice of her proposed removal and while still absent without leave, Pafford sent Klipsch a memorandum

requesting a transfer to one of the DOL offices in Tennessee. Klipsch replied that her authority regarding personnel matters was confined to the Indianapolis District Office, and advised Pafford to contact the DOL's Regional Personnel Office in Atlanta, Georgia. Pafford thereafter filed an application with Alfred Perry, the DOL Deputy Regional Administrator in Atlanta, requesting a transfer effective November 2, 1992, four days before her removal would become effective. On October 30, Perry denied Pafford's request for transfer, stating that the region currently exceeded its allocated staffing level.

Despite Perry's statement that there were no openings in the Atlanta region, Pafford sent Klipsch another request for transfer, asserting that Perry had advised her to obtain the transfer through her direct supervisor. By letter dated November 5, 1992, Klipsch again explained that she did not have the authority to grant Pafford's request for transfer. Klipsch also expressed doubt about whether Pafford made the request in good faith, given that Perry's memorandum indicated that there were no openings in his region, that Pafford had been absent without leave for almost four months, and that her termination of employment was scheduled for November 6, 1992.

Pafford filed a charge of discrimination with the EEOC in September 1991 and received her right-to-sue letter in August 1992. Pafford's counsel filed suit on August 28, 1992, a few days before Pafford received notice of her proposed removal. The complaint, which was amended three times, alleged discrimination on the basis of Pafford's race and national origin, and retaliation. The district court granted summary judgment in

favor of the DOL on all of Pafford's claims. Pafford appeals.

Pafford contends on appeal that the district court failed to view the evidence in the light most favorable to her. Although the record is replete with attestations that Pafford was denied training and promotion opportunities and otherwise subjected to more exacting standards than non-minority employees, Pafford fails to link this alleged disparate treatment to her race, national origin, or retaliation. She offers no specific evidence demonstrating that she was similarly situated to the non-minority employees who allegedly received better treatment, or that the DOL retaliated against her for complaining of discrimination. We agree with the district court that the record fails to support Pafford's claims.

II. ANALYSIS

A. Summary Judgment Standard

We review the district court's award of summary judgment de novo, viewing all facts and inferences in the light most favorable to the non-moving party.[5] *See Oates v. Discovery Zone*, 116 F.3d 1161, 1165 (7th Cir.1997); *Essex v. United Parcel Serv., Inc.*, 111 F.3d 1304, 1308 (7th Cir.1997). Summary judgment may be granted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a

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[5] Pafford challenges the district court's usage of the phrase "even if such allegations were true" as an incorrect statement of the legal standard on a motion for summary judgment. We agree, but any error in this misstatement was harmless.

matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed.R.Civ.P. 56(c)).

B. Methods of Proof

Title VII makes it an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin," 42 U.S.C. § 2000e-2(a)(1), or for an employer "to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

A plaintiff trying to defeat an employer's motion for summary judgment has two methods of proof at his or her disposal. Under the "direct" method, the plaintiff may show (either through direct or circumstantial evidence) that the employer's decision to take the adverse job action was motivated by an impermissible purpose, such as her race or national origin. *See Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1397 (7th Cir.1997); *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir.1994). Under the "indirect" burden-shifting method, the plaintiff may raise an inference of discrimination by offering sufficient evidence to establish a prima facie case. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). If the plaintiff demonstrates a prima facie case,

then the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the action. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). If the employer carries this burden, then the burden shifts back to the plaintiff to produce "evidence that would, if believed by a trier of fact, show that the true reason for the employment action was discriminatory." *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1169 (7th Cir.1998) (citing *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-08 (1993); *Pilditch v. Board of Educ.*, 3 F.3d 1113, 1116 (7th Cir.1993)).

Pafford's brief does not identify the method of proof she intends to employ. However, when asked at oral argument, Pafford's counsel stated that the *McDonnell Douglas* framework applied to this case. Notwithstanding this concession, we note that the majority of Pafford's evidence of discrimination concerns hostility towards Pafford and other minority employees. Such evidence is circumstantial evidence of intentional discrimination, "the kind that consists of ambiguous statements, suspicious timing, discrimination against other employees, and other pieces of evidence none conclusive in itself but together composing a convincing mosaic of discrimination against the plaintiff." *Troupe*, 20 F.3d at 737. Although circumstantial evidence could raise an inference of discrimination, *id.* at 736, it is not sufficient to do so in this case.

Pafford's circumstantial evidence of discrimination against minority employees consists of the following: after Klipsch became the District Director, no minority employees were hired and none were promoted, and all of the minority employees-Pafford (Filipino), Aquila

Crawford (African American), and Mandujano Garcia (Hispanic) – were terminated or resigned; Klipsch told someone in the office that the reason she lived on the south side of Indianapolis was to be "away from the black people"; at a retirement party Klipsch served cake in a friendly manner to Caucasian guests, but "threw the cake down on the table with an unfriendly look on her face" when she served Pafford and other minority guests; at an office picnic hosted by Charles McCormick (Caucasian), Klipsch and her family would not eat the tortillas brought by Garcia and when Garcia asked Klipsch why, she allegedly said "in a low, serious voice . . . that she did not trust him"; and Hooton wrote a memorandum to Pafford's personnel file regarding alleged complaints from an employer investigated by Pafford, but the alleged complaints were later contradicted by affidavits from the employer and Pafford.

Even if a trier of fact believed all of this evidence, it would not be sufficient to establish discrimination on the basis of Pafford's race and national origin. While some of the foregoing evidence suggests discriminatory animus, it still fails to meet the standard required to defeat the DOL's motion for summary judgment. Thus, the *McDonnell Douglas* test is indeed the appropriate method of proof in this case.

Pafford's circumstantial evidence was not presented in vain, however, for it can be used at the pretext stage of the *McDonnell Douglas* test to demonstrate the ultimate fact of discrimination. *See Perdomo v. Browner*, 67 F.3d 140, 146 (7th Cir.1995). Bearing this in mind, our task is to determine whether Pafford has come forward with sufficient evidence from which a trier of fact could reasonably

infer that the DOL denied her training or promotion on the basis of her race or national origin, or subjected her to retaliation for filing a charge of discrimination and later a lawsuit based on that charge.

C. Pafford's Claims

On appeal, Pafford's various factual arguments involve one legal principle – that in resolving a motion for summary judgment, the district court must view the evidence in the light most favorable to the non-movant.[6] Pafford contends that the district court not only failed to

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[6] Pafford also suggests a pattern and practice of discrimination through her references to the discriminatory treatment of minority employees by the "all white management." She points to the fact that after Klipsch became the District Director, all of the minority employees were either terminated or resigned. However, Pafford's allusions to disparate treatment and a pattern of discrimination did not give the DOL sufficient notice of these claims for purposes of Rule 8(a)(2) of the Federal Rules of Civil Procedure, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *See Vicom, Inc. v. Harbridge Merchant Servs., Inc.*, 20 F.3d 771, 775 (7th Cir.1994) ("The primary purpose of [Rule 8's] provisions is rooted in fair notice: Under Rule 8, a complaint must be presented with intelligibility sufficient for a court or opposing party to understand whether a valid claim is alleged and if so what it is.") (internal quotation marks and citations omitted). That Pafford's pleadings may have supported such claims had they been raised is not enough to preserve them on appeal because "the purpose of summary judgment is to refine the case sufficiently so that both parties know the precise injuries alleged and the evidence that would be used to prove them." *Sattar*, at 1168. Therefore, we confine our review to Pafford's retaliation and denial of training and promotion claims.

apply this standard, but also ignored her evidence of discrimination. In large part, this argument is aimed at the district court's failure to discuss her circumstantial evidence of disparate treatment. As previously noted, this evidence alone falls short of establishing a prima facie case of discrimination, but could be used to demonstrate pretext under the *McDonnell Douglas* test. For reasons explained below, we agree with the district court that Pafford has failed to come forward with sufficient comparative evidence to demonstrate a prima facie case of discrimination. The district court thus did not need to reach the pretext issue or Pafford's circumstantial evidence. *See Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1179-80 (7th Cir.1997). We now turn to Pafford's remaining arguments.

1. Failure to Train

Pafford contends that the DOL's refusal to provide her with the necessary training rendered her unable to develop the skills necessary for promotion from a GS-9 to a GS-11. In resolving Pafford's failure to train claim, the district court determined that Pafford must establish the following prima facie elements: (1) that she was a member of a protected class; (2) that she was similarly situated to persons outside her protected class; (3) that she was treated differently than those persons; and (4) that any training the DOL failed to provide her was material to further promotion. (D.Ct.Order, 18-19). On appeal, Pafford challenges the district court's conclusion that the training she sought was immaterial to her promotion to the GS-11 position.

Before analyzing the merits of this claim, initially we must determine whether the materiality of the training to promotion is a proper prima facie element. Although we do not apply the *McDonnell Douglas* test rigidly, the elements of a prima facie case serve the purpose of raising an inference of discrimination. Whether the training is material to Pafford's further promotion is irrelevant to whether the DOL denied Pafford training for a discriminatory reason. Therefore, the district court erred in requiring Pafford to produce such evidence.

Considering the facts of this case, to make out a prima facie case of discriminatory failure to train Pafford must demonstrate: (1) that she is a member of a protected group; (2) that the DOL provided training to its employees; (3) that she was eligible for training; and (4) that she was not provided training under circumstances giving rise to an inference of discrimination, *i.e.*, that she was denied training given to other similarly situated employees who were not members of the protected group. *See Patel v. Allstate Ins. Co.*, 105 F.3d 365, 371 (7th Cir.1997);[7] *Lopez v. Metropolitan Life Ins. Co.*, 930 F.2d 157,

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[7] In *Patel*, this court briefly addressed the failure to train claim. The parties agreed that to establish a prima facie case, the plaintiff would have to establish, "among other things, that the training she sought was not provided under circumstances giving rise to an inference of discrimination." *Patel*, 105 F.3d at 371 & n.5. The court then cited *Lopez v. Metropolitan Life Ins. Co.*, 930 F.2d 157 (2d Cir.1991). In *Lopez*, the Second Circuit held that to establish a prima facie case of discriminatory denial of training, the plaintiff must demonstrate: (1) that she is a member of a protected group; (2) that she satisfactorily performed the duties required by her position; (3) that the employer had a policy of providing on-the-job training; and (4)

161 (2d Cir.1991). The latter two requirements are at issue in this case.

The DOL's policy regarding training for career ladder promotion provides: "Supervisors are to assign each employee in a career ladder position developmental work or projects of sufficient complexity and responsibility to allow the employee to demonstrate that he/she is capable of performing satisfactorily at the next higher level in the career ladder." Klipsch and Wyzguski maintain that Pafford was not eligible for training as a GS-11 investigator because she had not mastered her present position as a GS-9 investigator.

Pafford argues that she was qualified to receive training for the GS-11 position because she was performing at that level. However, the only evidence she presented that she was performing at the GS-11 level consists of two compliments she received, one from former District Director Johnson Beaven in 1988 and one from Wyzguski in 1990, that she was "doing GS-11 work."[8] The district court treated these two compliments as hearsay and, alternatively, found that they were insufficient to rebut the overwhelming evidence of Pafford's performance

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that she was not provided training under circumstances giving rise to an inference of discrimination. *Id.* at 161.

[8] Beaven's statement was in reference to Pafford's first significant case in which she convinced the employer to pay $13,145 in back wages. At the time, Pafford was only a GS-7 compliance officer, but the amount of back wages she recovered from the used car dealership was within the authority of a GS-11 officer. In 1990 Pafford recovered over $35,000 in back wages from another employer, and Wyzguski allegedly told Pafford that she was doing GS-11 work.

deficiencies and absenteeism, which demonstrates that she was not eligible to be trained for the GS-11 position. One of the compliments related only to the amount of back wages recovered by Pafford and not to the other aspects of GS-11 work, and both of the compliments preceded the onset of Pafford's more serious performance problems and excessive absenteeism.

Pafford attempts to demonstrate a prima facie case by piecing together allegations that white employees received more training than she did. However, the mere fact that Caucasian employees may have received more training than Pafford falls short of raising an inference of discrimination. Pafford must come forward with specific evidence showing that she was similarly situated to Caucasian employees who received more training. This she has failed to do.[9]

Based on Pafford's charge of discrimination, her denial of training and promotion claims concern four Caucasian employees, who were hired at the GS-7 level after Pafford and promoted to the GS-11 level while Pafford remained at the GS-9 level. Pafford contends that these Caucasian employees were developed to reach the

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[9] The only specific evidence of training received by a Caucasian employee is Charles McCormick's affidavit testimony that he was trained by almost all of the senior investigators, allowed to attend a seminar on the Migrant and Seasonal Agricultural Worker Protection Act – which he claimed prepared him for GS-12 cases – and trained in a whistle blower case. Pafford does not, however, demonstrate that she is similarly situated to McCormick.

GS-11 level but she was not.[10] However, Pafford's daily activity reports, referred to as WH-40's, reveal that she attended Basic Training I and II, a two-day Federal Women's Training Seminar, one week of Total Quality Management Training, four days of training on the 1989 Fair Labor Standards Act amendments. She also reviewed related cases for training purposes and read the Code of Federal Regulations and Field Operations Handbook. During the first year following her attendance of Basic Training I, Pafford logged more hours of training than three of the four Caucasian employees. Pafford listed 544 hours of training on her WH-40's, whereas the Caucasian employees (Edie McCullough, Jill Cousert, Judy Glazier, and Peter Engelke) trained for 579 hours, 294 hours, 423 hours, and 509 hours, respectively. Thus, there is no evidence that Pafford was denied sufficient training for

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[10] In her affidavit, Klipsch admits that the training Pafford received varied somewhat from the training these Caucasian employees received. Most of Pafford's training was one-on-one instruction from Klipsch because when Pafford was hired, she was the only person at that level of training. The four investigators hired in late 1988 received more group instruction because Klipsch did not have the time to give each of them individualized instruction. Several senior investigators were stationed in the Indianapolis office at the time Pafford was hired, which allowed her to accompany experienced investigators without traveling to a field office. Nevertheless, Pafford did have the opportunity to work with at least one field investigator in the fall of 1988. By the time the four investigators hired in 1988 arrived, four of the senior investigators had either been transferred or promoted to the national office. Thus, there were fewer opportunities to observe senior investigators in the Indianapolis office and the new investigators had to be sent to the field offices to obtain experience.

her position as a GS-9 investigator. With respect to the training for promotion from the GS-9 to the GS-11 level, Pafford offers no specific evidence about the training these Caucasian employees received. She thus has failed to demonstrate that she was denied the training that they received.

Pafford offers one instance of a Caucasian GS-9 investigator who allegedly had not mastered his present position before receiving advanced training. Charles McCormick was sent to a seminar that he described as involving GS-12 work. Aside from the absence of any proof that the seminar was only for GS-12 investigators, Pafford failed to offer any evidence demonstrating that she was similarly situated to McCormick and, thus, has failed to establish a prima facie case. Pafford's conclusory statements that she was not trained are not sufficient to defeat the DOL's motion for summary judgment.

2. Failure to Promote

The district court also found that Pafford did not present sufficient evidence to sustain her failure to promote claim. Pafford contends that the district court erred in reaching this conclusion without considering the evidence that she was denied training on the basis of her race and national origin. We disagree.

A failure to train claim is distinct from a failure to promote claim. One of the prima facie elements of a failure to promote claim is that the plaintiff demonstrate that she was qualified for the promotion position. If the plaintiff was not qualified for any reason, then she falls short of establishing a prima facie case and there is no

inference of discrimination. *See Coco*, 128 F.3d at 1179 (where the plaintiff claimed that the employer's stated expectations were not bona fide, this court held that the plaintiff relying totally on the *McDonnell Douglas* formula "is out of luck if he can't show that he was meeting his employer's legitimate expectations"). To conclude otherwise would undermine the purpose of the *McDonnell Douglas* formula. If Pafford failed to establish that she was qualified for promotion, then all that would remain of the prima facie case would be her membership in a protected group and the promotion of Caucasian employees; under these circumstances, the inference that Pafford would have been promoted but for her race or national origin is too weak to allow the factfinder "to speculate on the motive for the [denial of promotion]." *Id.* Thus, the district court action was proper in not conflating Pafford's claims by considering evidence of the failure to train in determining whether Pafford had established her failure to promote claim.

To demonstrate a prima facie case for a failure to promote claim, the plaintiff must show that: (1) she is a member of a protected group; (2) she applied for and was qualified for the position; (3) she was rejected for the position; and (4) those who were promoted had similar or lesser qualifications for the position, or other evidence from which one can infer that the plaintiff was denied promotion for a discriminatory reason. *See Leffel v. Valley Fin. Servs.*, 113 F.3d 787, 793 (7th Cir.) (based on the Supreme Court's opinion in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311-12 (1996), this court has "disavowed prior cases from this circuit suggesting that a Title VII plaintiff must show that she was replaced by

someone of a different race, sex, and so on"), *cert. denied*, 118 S.Ct. 416 (1997).

Requirements for career ladder promotion in the DOL are set forth in several policy memoranda. To be eligible for promotion, an employee in a career ladder must, in the judgment of the supervisor, satisfy the following criteria:

> (1) Meet all the performance requirements for the duties and responsibilities of the current position and also carry out specific assignments or projects typical of the next higher grade position in the career ladder;
>
> (2) [Have] [r]egularly demonstrated through assigned work, performance in the current position which clearly indicates the probability of satisfactory performance in the next higher level career ladder position;
>
> (3) Have performed in the position for a sufficient length of time to allow adequate observation of the work performed.

Klipsch attested that if a GS-9 investigator's submitted cases were accurate with respect to the computation of back wages and application of the law, then she would begin to consider the investigator for promotion to the GS-11 level. But "[i]f at any point in this progression, the [investigator] was not making progress toward independently completing investigations accurately and in an efficient manner and becoming proficient at resolving compliance and back wages issues, [Klipsch] would not continue to give them more difficult cases and would not move them into a more independent mode."

Pafford attempts to demonstrate that she was qualified for promotion by arguing that her performance was always rated as satisfactory, and the DOL has failed to produce a document that indicates otherwise. Although Pafford may have received satisfactory ratings for purposes of within-grade step increases from 1988 through 1991, these ratings do not negate the ample evidence to the contrary, such as her chronic absenteeism, her suspension, the leave restrictions, and the performance improvement plan.

Pafford has failed to come forward with sufficient evidence of her qualifications for promotion, and has likewise failed to establish that she was as qualified or more qualified than the four Caucasian employees who were promoted. Any inference of discrimination that could be drawn from the promotion of four Caucasian employees is negated by the fact that four other Caucasian employees (Carol Atkinson, Linda Stalion, Charles McCormick, David Filbey) hired during the same period as Pafford were not promoted to the GS-11 level.[11]

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[11] A number of Caucasian Wage-Hour Investigators in the Indianapolis District Office were not promoted or were terminated while Pafford was employed at the DOL (1987 through 1992). Carol Atkinson never progressed beyond the GS-9 level and, in fact, requested reassignment to the position of GS-7 Wage-Hour Assistant. Linda Stalion, an investigator in the Evansville Field Office, likewise never advanced beyond the GS-9 level. She was counseled about her poor performance and advised that if she did not improve she would be placed on a Performance Improvement Plan ("PIP"). Stalion subsequently sustained an injury while at work, resulting in her taking leave without pay. Ultimately, the DOL discharged her for excessive leave without pay. Charles McCormick, a disabled veteran, was

Pafford has thus failed to demonstrate a prima facie case of discriminatory denial of promotion.

3. Retaliation

Although Pafford did not claim retaliation in her charge of discrimination, she alleges retaliation in her third amended complaint (and in each preceding complaint). There is no evidence that Pafford exhausted her administrative remedies with respect to this claim, but for reasons unexplained in this record the DOL did not raise the issue of waiver in the district court or on appeal. This affirmative defense is thus waived, and we consider the merits of Pafford's retaliation claim.

It was unclear from Pafford's pleadings and submissions which actions she claimed to be retaliatory. The district court determined that Pafford's retaliation claims related to the weapons screening, her termination, and her denial of transfer. Pafford does not challenge that characterization of her claims.

The *McDonnell Douglas* burden-shifting formula applies to retaliation claims just as it applies to discrimination claims. *See Gleason v. Mesirow Fin., Inc.*, 118 F.3d 1134, 1146 (7th Cir.1997). To establish a prima facie case of retaliation, Pafford must show that (1) she engaged in

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not promoted to the GS-11 level after a year at the GS-9 level and ultimately accepted disability retirement. Finally, David Filbey became a GS-7 investigator in June 1990, having been elevated from a student trainee. Filbey was not promoted to the GS-9 level, and in 1993 sought and received reassignment to the position of GS-9 Wage-Hour Assistant.

statutorily protected expression, *i.e.*, reporting or otherwise opposing conduct prohibited by Title VII, (2) she suffered an adverse employment action, and (3) there is a causal link between her protected expression and the adverse employment action. *Id.* If shown, the employer must offer a legitimate, nondiscriminatory reason for its actions. The burden then shifts back to the plaintiff to demonstrate that the employer's proffered explanation is merely a pretext for retaliation.

a. Weapons Screening

Pafford contends that the district court applied the wrong legal standard in analyzing the unlawfulness of the "searches" to which she was subjected upon entry into the federal courthouse where she worked. The standard that Pafford urges us to apply is the standard for determining whether a search was reasonable under the Fourth Amendment. Because Pafford complains that the search evidenced discriminatory or retaliatory animus, Title VII standards apply.

Pafford argues that the district court ignored her testimony that Wyzguski told her that he considered an incident of violence by an "oriental" student in deciding to screen her for weapons. Given the district court's characterization of the weapons screening incident as a retaliation claim related to Pafford's complaints of discrimination, it is understandable why the district court did not address this racial comment. However, this statement alone does not defeat the DOL's motion for summary judgment on this claim. According to Wyzguski's affidavit, he based his decision on more than the incident

of violence committed by an Asian college student. He also considered Hooton's concern for her safety, that Pafford had come into his office and cried on several occasions, the rumor that Pafford owned a gun and carried it in her car or on her person, and a recent incident in which a postal employee shot and killed his supervisor and then committed suicide. The fact that Wyzguski had previously referred Pafford to the Employee Assistance Program for counseling based on her emotional condition lends credence to the DOL's proffered reason for the screening.[12] Pafford has not come forward with sufficient evidence to demonstrate that the offered reason was merely a pretext for discrimination.

Pafford also contends that the trial judge ignored Wyzguski's testimony that he told Klipsch that the search was no longer necessary. Pafford asserts that Klipsch's decision to continue the search in the face of Wyzguski's recommendation creates a genuine issue of fact regarding whether the search was necessary or harassment. The fact that Klipsch reinstated the screening is not evidence of discrimination or retaliation. It simply demonstrates a different assessment of the evidence regarding the danger posed by Pafford.

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[12] Although Pafford did give her union representative an article about stress and violence in the workplace, she did so after Wyzguski and Klipsch ordered the search and thus the article could not have entered into their decisionmaking process.

b. Termination

Pafford argues that the district court erred in relying on her absenteeism and failure to follow instructions as a legitimate nondiscriminatory reason for her termination. Although unclear from her brief, she seems to contend that the leave restriction was discriminatory and, therefore, that her absences could not be a nondiscriminatory reason for terminating her.

Because Pafford has failed to demonstrate that the leave restriction was motivated by her race or national origin, she cannot prevail on this argument. She attempts to show that Caucasian employees Linda Stalion and Charles McCormick were allowed to take leave without pay for more than one year, yet were not subjected to a leave restriction. But she fails to establish that she is similarly situated to either of these employees. The leave restriction imposed on Pafford followed a series of absences totaling 77 days. There is no evidence that McCormick or Stalion had past absences of comparable magnitude. Furthermore, Stalion, like Pafford, was terminated due to excessive leave without pay. Thus, there is no evidence that Pafford's leave restriction was imposed for a discriminatory reason, defeating Pafford's argument that her absences were not a nondiscriminatory reason for her termination.

Pafford next cites Filbey's and Atkinson's voluntary demotions as evidence of discrimination, arguing that she was not given the opportunity to be demoted rather than terminated. The fact that the DOL agreed to demote these employees is not relevant in this case because Pafford

does not allege that she ever sought demotion. On the contrary, it was a promotion that she was after.

Finally, Pafford argues that her termination constituted retaliation for having filed a complaint of discrimination because the notice of proposed removal was issued within a week of her filing suit in the district court. She also points out that Hooton rejected her medical excuse due to an illegible physician's signature immediately after she filed her formal administrative complaint of discrimination in September 1991.

Although the timing of the termination notice may be sufficient to establish a prima facie case of retaliation, Pafford lacks any evidence demonstrating that the DOL's offered reason for terminating her is pretextual. Pafford's long history of absenteeism negates any inference that the notice of removal was retaliatory. Pafford was warned in July 1991 that failure to comply with the leave restriction and excessive absences without leave could lead to termination, yet her absences persisted thereafter. Pafford's leave restriction was twice extended for an additional six months due to her failure to adhere to its requirements, and Pafford was absent without leave for the last four months of her employment. Because she has failed to show that her termination was a pretext for retaliation or discrimination, the DOL was entitled to summary judgment on this claim.

c. Denial of Transfer

Pafford argues that the district court erred in accepting Klipsch's statement that Pafford's request for transfer

exceeded the scope of her authority for personnel transactions, which was limited to the Indianapolis District Office. Pafford maintains that Klipsch's reason for denying her transfer was not legitimate because although Klipsch did not have final authority over the transfer, she did have the authority to initiate the transfer but refused to do so. We need not reach the merits of this argument because it is clear that Klipsch did not take any adverse action against Pafford, defeating her prima facie case of retaliation. Although Klipsch could have initiated the transfer, the denial of Pafford's request ultimately came from Alfred Perry in the Atlanta Regional Office, who stated that a transfer was not possible at that time because the staffing level of the region exceeded its allocated level.

4. MSPB Decision

Pafford argues that the district court's grant of summary judgment on her MSPB appeal must be reversed for the same reasons as the decision regarding her Title VII claims. Because the claims raised in Pafford's MSPB appeal are subsumed within her Title VII claims, we need not address them separately.

III. CONCLUSION

Pafford has failed to raise an inference of discrimination with respect to her claims of discrimination and retaliation. For the foregoing reasons, we AFFIRM the judgment of the district court.

No. 96-4241

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

JUL. 31, 1998

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

July 29, 1988 [sic].

Before

Hon. RICHARD A. POSNER, *Chief Judge*

Hon. JOHN COFFEY, *Circuit Judge*

Hon. ILANA D. ROVNER, *Circuit Judge*

ESTER V. PAFFORD, and THOMAS A. KRUDY, Trustee in Bankruptcy for the Estate of Ester v. Pafford *Plaintiffs-Appellants,*	Appeal from the United States District Court for the Southern District of Indiana Indianapolis Division
No. 96-4241 v.	No. IP 92-C-1178-B/F Sarah Evans Barker, *Judge*
ALEXIS M. HERMAN, Secretary of Labor, *Defendant-Appellee.*	

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing is DENIED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ESTER V. PAFFORD, and THOMAS A. KRUDY, trustee in bankruptcy for the Estate of Ester V. Pafford,	)	
Plaintiff,	)	Case No. IP
v.	)	92-1178-C-B/F
ROBERT B. REICH, U.S. Secretary of Labor,	)	
Defendant.	)	

JUDGMENT

In accordance with the Court's Entry in the above named cause of this same date, Defendant Robert B. Reich's motion for summary judgment is granted in its entirety. Judgment is entered in favor of Defendant and against Plaintiff Ester V. Pafford. Each party is to bear its own costs.

It is so ORDERED this 27th day of November 1996.

/s/ Sarah Evans Barker
SARAH EVANS BARKER,
CHIEF JUDGE
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ESTER V. PAFFORD, and THOMAS A. KRUDY, trustee in bankruptcy for the Estate of Ester V. Pafford,	)	Case No. IP 92-1178-C-B/F
Plaintiff,	)	
v.	)	
ROBERT B. REICH, U.S. Secretary of Labor,	)	
Defendant.	)	

ENTRY DISCUSSING GRANT OF SUMMARY JUDGMENT

Plaintiff Ester V. Pafford ("Pafford"), a former Wage and Hour Compliance Specialist with the U.S. Department of Labor's Indianapolis District Office, has brought a third amended complaint against Defendant Robert B. Reich, in his capacity as U.S. Secretary of Labor. In her complaint, Pafford alleges that while she was employed with the Department of Labor ("DOL"), department employees discriminated against her on the basis of her race and national origin in violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e *et seq.*, by failing to provide her with the same training and promotion opportunities provided to nonminority wage and hour compliance specialists. Pafford also alleges that, after she complained of this discrimination, DOL retaliated against her also in violation of Title VII by, among

other things, refusing to transfer her to another district office and ultimately by discharging her. In addition to her Title VII claims, Pafford also appeals a decision of the Merit Systems Protection Board, an administrative review panel. Presently before the Court is Defendant's Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. For the reasons set forth below, the Court grants Defendant's motion.

I. Factual Background

Pafford is a U.S. citizen of Filipino origin, residing in Marion County, Indiana. She identifies her race as Asiatic/Pacific Islander. Pafford began employment with the Indianapolis District Office of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, on June 7, 1987 as a Wage and Hour Compliance Specialist at pay grade GS-7. She was subsequently promoted to pay grade GS-9 in September 1988.

In July 1991 Pafford's supervisor Jane Hooton put Pafford on a leave restriction on the grounds that Pafford had been using excessive amounts of sick leave and other forms of leave in place of sick leave. In a memorandum advising Pafford of the leave restriction, Hooton calculated that between June 26, 1990 and July 11, 1991 Pafford had used 266 hours of annual leave, 98 hours of sick leave, and 255 hours of leave without pay. (Def.'s Ex. 23)

In early August 1991 an Equal Employment Opportunity counselor at the Department began counseling Pafford in regard to her belief that she was being subjected to discrimination. On September 26, 1991 Pafford submitted a formal complaint of discrimination to the

Department, in which she alleged that her Indianapolis District office supervisors were discriminating against her.

In January 1992 Hooton extended the leave restriction an additional six months after determining that Pafford had been absent without leave seven times for 51 hours since the leave restriction had been put in place.

On May 28, 1992, Ken Morrison, who had replaced Hooton as Pafford's supervisor, put Pafford on a performance improvement plan, or a PIP. July 7 was Pafford's last day at work. On July 9, 1992, Pafford requested 520 hours of sick leave beginning that day. Morrison replied that Pafford did not have any remaining sick days and that she would be considered absent without leave until she returned to work.

After completing its internal investigation, the Department issued on July 27, 1992 a final agency determination finding that it had not discriminated against Pafford. On August 28, 1992 Pafford filed a complaint in this Court alleging that the Department had violated her rights under Title VII.

Morrison sent Pafford a notice or proposed removal on September 2, 1992 based on her absence and her failure to follow directions. Later that month Pafford requested 512 hours of sick leave. In early October Pafford requested a transfer to one of the Department's offices in Nashville, Knoxville, or Memphis, Tennessee, but the Department did not offer her a transfer. On October 28, 1992 Assistant District Director Connie Klipsch issued a decision removing Pafford from employment effective November 6, 1992.

Apparently, Pafford appealed one or more of the adverse DOL personnel decisions to the Merit Systems Protection Board ("MSPB"). She does not specify what personnel decision she appealed, but she alleges that the MSPB issued a final decision on April 13, 1993 and that she was advised that she could file a civil action to review the Board's decision within thirty days.

Pafford filed her first Complaint in this cause of action on August 28, 1992, followed by successive amendments. She filed her Third Amended Complaint, which provides the basis for Defendant's Motion for Summary Judgment, on October 29, 1993. Pafford alleges that the Department violated her rights under Title VII by not giving her the same training and promotional opportunities afforded to white employees and by retaliating against her for asserting her rights under Title VII in numerous ways, including by terminating her employment. Pafford also seeks to have the April 13, 1993 decision of the MSPB reversed.

II. Summary Judgment Standard

Rule 56(c) of the Federal Rules of Civil Procedure provides that a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A genuine issue of material fact exists if there is sufficient evidence for a jury to return a verdict in favor of the nonmoving party on the particular issue. *Anderson v. Liberty Lobby. Inc.*, 477 U.S.

242, 248, 106 S.Ct. 2505, 2510 (1986); *Methodist Medical Center of Illinois v. American Medical Sec., Inc.*, 38 F.3d 316, 319 (7th Cir. 1994). Stated differently, summary judgment is appropriately entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Buckley Dement, Inc. v. Travelers Plan Adm'rs of Illinois*, 39 F.3d 784, 787 (7th Cir. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986)). A court must draw all reasonable and justifiable inferences in a fashion most favorable to the opposing party, and must resolve any doubts against the moving party. *Anderson*, 477 U.S. at 255, 106 S.Ct. at 2513; *McKenzie v. Illinois Dept. of Transportation*, 92 F.3d 473, 479 (7th Cir. 1996). Nevertheless, in order to demonstrate that a genuine issue of material fact exists as to those elements, the nonmoving party may not simply rest on the pleadings, but must affirmatively demonstrate by specific factual allegations that a genuine issue of material fact exists for trial. *See Hong v. Children's Mem. Hosp.*, 993 F.2d 1257, 1261 (7th Cir. 1993) *cert, denied*, 114 S.Ct. 1372 (1994); *Billups v. Methodist Hosp. of Chicago*, 922 F.2d 1300, 1302 (7th Cir. 1991). The nonmovant cannot meet her burden with conclusory statements or speculation. *See Smith v. Shawnee Library System*, 60 F.3d 317, 320 (7th Cir. 1995); *Weihaupt v. American Med. Ass'n*, 874 F.2d 419, 428 (7th Cir. 1989); *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1011 (7th Cir. 1985). Nor can she survive summary judgment solely on the basis of her own self-serving affidavit testimony that lacks factual support in the record. *See Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293,

1295 (7th Cir. 1993). Instead, the nonmovant must provide appropriate citation to relevant admissible evidence. *See* S.D. Ind. Local Rule 56.1; *Waldridge v. American Hoechst Corp.*, 24 F.3d 918, 934-44 (7th Cir. 1994).

Under this District's Local Rule 56.1, a nonmovant is directed to set forth in her Statement of Genuine Issues "appropriate citations to discovery responses, affidavits, depositions, or other admissible evidence, all material facts as to which it is contended there exists a genuine issue necessary to be litigated." See S.D. Ind. Local Rule 56.1. To determine whether Pafford has met her burden of establishing a triable issue of fact as to each of her claims, we look to the evidentiary materials to which Pafford cites in her Statement of Genuine Issues. We are not required to scour Pafford's evidentiary materials for evidence that she, herself, does not invoke. *Cf. United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs").

III. Analysis

A. Discrimination claim

Title VII of the Civil Rights Act of 1964, as amended, requires federal agencies to make "[a]" personnel actions affecting employees . . . free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a) (1994). Before a federal employee may bring an action based on a violation of her Title VII rights, she must first exhaust her administrative remedies. *Pack v. Marsh*, 986 F.2d 1155, 1157 (7th Cir. 1993); *McAdams v. Reno*, 64 F.3d 1137, 1141 (8th Cir. 1995); *Bayer v. U.S. Dep't of Treasury*, 956 F.2d 330 (D.C. Cir.

1992). An aggrieved employee exhausts her administrative remedies by bringing an administrative claim before the department or agency charged with discrimination. 42 U.S.C. § 2000e-16(c).

The administrative exhaustion requirement has a corollary: the employee cannot bring claims in a lawsuit that were not included in her administrative complaint against the agency. *See Cheek v. Western & Southern Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994) (applying rule in context of suit against private employer) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47, 94 S.Ct. 1011, 1019 (1974)); *James v. United States*, 888 F. Supp. 944, 948 (S.D. Ind. 1995) (applying rule in context of suite against the government). This condition precedent, with which all Title VII plaintiffs must comply, is not so stringent as to require the initial charge to contain "each and every fact that combines to form the basis of each claim [in the lawsuit.]" *Cheek*, 31 F.3d at 500. However, in order to be cognizable, Title VII claims set forth in a district court complaint must be: (1) reasonably related to the allegations of the administrative complaint, and (2) grow out of those allegations. *Id.* Therefore, we look to Pafford's September 26, 1991 formal administrative complaint to determine the scope of her Title VII claim. Pafford stated in her administrative complaint:

> I found out that the four employees hired after me were *developed* and upgraded to GS-11. They are all white Caucasians. They all started at GS-7, upgraded to GS-9 and now to GS-11. They were sent to New Albany field station and to Evansville field station for training and then to

> South Bend for projects. They were all developed to reach their GS-11 while I was not given the same opportunity since 1988.

(Pl.'s Ex. 9) (emphasis in original) We read Pafford's administrative complaint as alleging that Defendant discriminated against Pafford by failing to promote her and by failing to train her.

1. Failure to promote

Pafford lacks any direct evidence that DOL's failure to promote her was the result of discrimination. Consequently, she must rely on the indirect burden-shifting method of proof set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), and its progeny. Under this indirect method of proof, the plaintiff must first establish a prima facie case of racial discrimination by a preponderance of the evidence. *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, ___, 113 S.Ct. 2742, 2747 (1981); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093-94 (1981). "Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Burdine*, 450 U.S. at 254, 101 S.Ct. at 1094-95; *Hicks*, ___ U.S. at ___, 113 S.Ct. at 2747. This presumption places upon the defendant the burden of producing "evidence which, *taken as true*, would *permit* the conclusion that there was a nondiscriminatory reason for the adverse action." *Hicks*, ___ U.S. at ___, 113 S.Ct. at 2748 (emphasis in original). If the defendant meets this burden of production, the presumption drops from the case and is no longer relevant. *Id.* at ___, 113 S.Ct. at 2749.

The plaintiff must then prove by a preponderance of the evidence that "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine*, 450 U.S. at 253, 101 S.Ct. at 1093. As the Supreme Court repeatedly stressed in *Hicks*, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Hicks*, ___ U.S. at ___, 113 S.Ct. at 2747.

To establish a prima facie case that in not being promoted to the GS-11 level she was discriminated against, Pafford must show: (1) that she is a member of a protected group; (2) that she applied for and was qualified for the position sought; (3) that she was rejected for the position; and (4) that the Defendant granted the promotion to a person who had similar or lesser qualifications. *Sample v. Aldi Inc.*, 61 F.3d 544, 548 (7th Cir. 1995); *Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 1467, 1472-73 (7th Cir.), *cert. denied*, 510 U.S. 959 (1993). Based on the evidence before the Court, Pafford cannot establish a prima facie case of discrimination in promotion because she cannot demonstrate that she was qualified for a promotion or that the persons whom DOL did promote were not better qualified that Pafford.

As part of DOL's internal investigation of Pafford's administrative complaint, two of Pafford's supervisors, Connie J. Klipsch and Ray Wyzguski, prepared affidavits, in which they testify that Pafford had not developed the requisite skills for advancement to the GS-11 level. See Def.'s Ex. 7 and Ex. 9.

Klipsch was Pafford's first-level supervisor from the time Pafford was hired in June 1987 until August 1989. (Def.'s Ex. 3, p. 12) From August 1989 until October 1990, Klipsch was Pafford's second-level supervisor. (*Id.*) Klipsch testified concerning Pafford's difficulty with her work after she was promoted to the GS-9 level.

> In the first few cases submitted to me after she returned from Basic II [training], she had significant problems with applying the law properly and with time utilization. On May 30, 1989, I met with her to discuss her performance and her open cases. * * * I talked with her about the problems I saw with her cases and discussed ways to improve this. I told her then that although she would be eligible for promotion to GS-11 in September or October 1989, that based on what I saw then, she would not be ready. She said that she agreed and asked that I give her time to improve her performance.

(Def. Ex. 3, p. 12) In order for Klipsch to have recommended Pafford for promotion to GS-11, Klipsch testified that Pafford would have to have been able to demonstrate that she could:

> (1) Meet all the performance requirements for the . . . current position and also carry out specific assignments . . . typical of the next higher grade in the career ladder.
>
> (2) Regularly demonstrate through assigned work, performance in the current position with clearly indicates the probability of satisfactory performance in the next higher level career ladder position.

> (3) Have performed in the position for a sufficient length of time to allow adequate observation of the work performed.

(*Id.*, p. 8) Klipsch testified that in order to have promoted Pafford, she as well as future supervisors would have to be able to review completely Pafford's investigations to see if Pafford was performing satisfactorily as a GS-9 and demonstrating the abilities needed to perform at the GS-11 level. (*Id.*, p. 13) On May 30, 1989 Klipsch told Pafford that based upon her performance, she would not be promoted to the GS-11 level in September when she would become eligible for the promotion. (*Id.*, p. 12) In her subsequent affidavit, Klipsch explained Pafford"s shortcomings at that time as follows:

> She was continuing to have difficulty in working independently as demonstrated by her frequent requests for assistance from me and her colleagues. She also had not demonstrated an ability to correctly apply the law or to effectively and efficiently utilize her time (both in amount of time spent and length of time spent). This was inconsistent with the requirements of position description for the GS-11 Wage and Hour compliance specialist.

(*Id.*, p. 16) Thereafter and through October 1990, Klipsch testified that she discussed Pafford's performance with Assistant District Director Ray Wyzguski. "During these conversations, ADD Wyzguski informed me that he was unable to recommend her promotion because she was not able to complete investigations correctly without significant guidance from him and that she was having difficulty making decisions about her cases and utilizing her time effectively." (*Id.*, p. 17)

Klipsch left the Indianapolis district office in October 1990 but returned to that office in December 1991. (*Id.*) Upon returning to the office, Klipsch discussed Pafford's performance with Assistant District Director Jane Hooton, who, Klipsch stated, told her that Pafford was continuing to have problems in correctly applying the law and that Pafford was confused on such elementary issues as regular rate and coverage. (*Id.*, p. 17) At the time of her affidavit, Klipsch testified that Pafford was being assigned cases that would not demonstrate her ability to do GS-11 level work. (*Id.*) "Before ADD Hooton can begin to give [Pafford] assignments which can demonstrate her ability to perform at the GS-11 level, she will need to improve her performance at the GS-9 level." (*Id.*)

Klipsch's assessment of Pafford's problems is echoed Wyzguski who served as Pafford's first-level supervisor from August 1989 to February 1991 and second-level supervisor from February 1991 to November 1991. (Def.'s Ex. 9, p. 3) In the affidavit he prepared in the course of DOL's internal investigation of Pafford's administrative claims, Wyzguski discussed the difficulties he observed Pafford was having as a GS-9 investigator, beginning from the time he was assigned as her first-level supervisor. He also testified as to the reasons Pafford was not promoted. We quote at length from his affidavit.

> Ms. Pafford was having difficulty performing at the GS-9 level and I proceeded to train and retrain her in Fair Labor Standards Act policies, interpretations, and investigation procedures. Throughout the time I was Ms. Pafford's first level supervisor, I found it necessary to retrain her on aspects of the Fair Labor Standards Act as I reviewed her completed investigation files

and found that they were not of sufficient quality relative to her GS-9 grade level. I would train her on a specific subject and find several months later that she had not mastered the subject. I did not assign to her more complex program areas such as the Migrant and Seasonal Workers Protection Act or the Davis Bacon Act because it was necessary for her to master the Fair Labor Standards Act first.

I did not recommend Ms. Pafford for promotion to the GS-11 level because she was having difficulty at the GS-9 level. Although she received Fully Successful performance ratings, her performance was at the low end of successful, and in some cases, below that level.

* * *

* * * I gave Ms. Pafford training on policies and procedures to be mastered ad [sic] the GS-7 and GS-9 levels and she did not demonstrate sufficient competency, so that we could progress to developmental assignments preparing her for promotion to the GS-11 level. * * * Ms. Pafford was very demanding of my time as a supervisor. A GS-11 is expected to function independently and Ms. Pafford's constant questions evidenced her inability to perform on her own as the GS-11 status required. * * *

In February, 1991, Jane Hooton was promoted to temporary Assistant District Director and I became Ms. Pafford's second level supervisor. Ms. Pafford's work products [sic] continued to show the need for training and retraining in interpretations, policies, and procedures appropriate for GS-9 level. ADD Hooton discussed Ms. Pafford's progress with me and

> showed me examples of her work which demonstrated the continuing need for training to master GS-9 level work before proceeding to developmental assignments preparing her for promotion to GS-11. Ms. Pafford appeared to be unable to grasp certain investigation policies even after repeated training.

(Def.'s Ex. 9, pp. 4-5)

Wyzguski and Klipsch's affidavits are strong evidence that Pafford was not qualified for a promotion to the GS-11 level. In response, Pafford offers nothing more than her own self-serving affidavit testimony. For example she testifies that, after she completed her first big case involving recovery of back wages from a used car dealership in Morgantown, District Director Johnson Beaven "complimented me on my work and told me that I was doing GS-11 level work." (Pafford Aff., ¶ 8) She also testifies that after recovering back wages from another business, "Ray Wyzcjuski said it was good work and GS-11 work." (Pafford Aff., ¶ 3) These second-hand compliments suffer from being both hearsay, and self-serving. Moreover, even if we were to accept that Beaven and Wyzguski made these complimentary remarks in regard to Pafford's work in two specific investigations, two such off-hand comments do not in any way controvert the much broader and deliberate assessments that Wyzguski and Klipsch gave under oath. Pafford does not direct the Court to anything else in her substantial proffer of evidence to support her contention that she was qualified for a promotion to the GS-11 level. Based on the evidence before the Court, Pafford has not met her burden of establishing that she was qualified to be promoted. *See*

Rabinovitz v. Pena, 89 F.3d 482, 487 (7th Cir. 1996) (plaintiffs own opinion about his performance or qualifications does not raise a material factual dispute).

Pafford also fails to establish a second element of the prima facie test: namely, that those who were promoted to the GS-11 level were not more qualified than she. Surprisingly, nowhere in Pafford's extensive evidentiary proffer does she present any objective evidence that any individual that DOL promoted to the GS-11 level was similarly situated to Pafford. In her deposition testimony (we rely on a transcript submitted by DOL because Pafford did not submit one herself, despite her reliance on it), Pafford states that DOL employees Cousert, Morrison, McCullough and Glazier were promoted from the GS-9 level to the GS-11 level. (Pafford Depo., pp. 351-52) The transcript of the deposition, however, reveals that-though Pafford may believe that she also should have been promoted, she does not know the qualifications of these other DOL employees.

Q: Okay. So Cousert, Morrison, McCullough and Glazier?

A: Right

Q: They were promoted from a 9 to an 11?

A: I believe so.

Q: And you were not?

A: Bypassing me.

* * *

Q: Do you believe their promotions were discriminatory against you?

A: Yes.

Q: Why?

A: I was hired before them. I could have been developed as a GS-11. They were given the training, and I was not given the same opportunity.

Q: Do you believe that because you were hired before them you were entitled to be promoted before them?

A: I have the opportunity to develop myself, but they did not give me that opportunity.

* * *

Q: Do you think that performance is a basis upon which to promote you?

A: It's one of the bases.

Q: Do you know anything about the performance of the four investigators that you have just mentioned?

A: I don't know of their performance.

(Pafford Depo., pp. 352-55) Other than this admission of ignorance, Pafford has not submitted any evidence that other wage and hour compliance specialists promoted to the GS-11 level were similarly situated to her. Instead, she refers generally to the affidavits that Klipsch and Wyzguski prepared as part of DOL's internal investigation of her administrative complaint. *See* Def.'s Ex. 7 and Ex. 9. Wyzguski's affidavit, however, does not identify *any* individual promoted ahead of Pafford. In her affidavit, Klipsch does identify six individuals who were promoted to the GS-11 level ahead of Pafford: Alice Hertli, Edith McCullough, Jill Cousert, Judy Glazier, Peter

Engelke, and Pam Frazee. However, Klipsch's affidavit makes clear that each of these individuals had demonstrated the skills expected of a GS-11 wage and hour specialist whereas Pafford had not. *See* Def.'s Ex. 3, pp. 18-20.

Even if we were to assume that Pafford had established a prima facie case of Title VII discrimination, which she clearly has not, the affidavits of Klipsch and Wyzguski, stating that Pafford had not developed the requisite skills for advancement to the GS-11 level, *see* Def.'s Ex. 7 and Ex. 9, are a legitimate nondiscriminatory reason for DOL's not having promoted Pafford to the GS-11 level. Under the McDonnell-Douglas burden-shifting method of proof, once an employer comes forward with a nondiscriminatory reason for the employment decision, the plaintiff then has the burden of demonstrating that the proffered reason is actually pretextual. Pafford offers no argument or evidence that the explanation for not promoting her that Klipsch and Wyzguski gave in their affidavits was pretextual. *See* Pl.'s Resp. Br., pp. 70-75. Pafford's conclusory statements about her ability do not create a genuine issue of fact as to whether her supervisors' reasons for not promoting her were pretextual. *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435, 441 (7th Cir. 1996); *Johnson v. University of Wisconsin-Eau Claire*, 70 F.3d 469, 481 (7th Cir. 1995). Having failed to rebut DOL's explanation for not promoting Pafford, there is no remaining material issue of fact and Defendant is entitled to summary judgment on Pafford's failure-to-promote claim.

2. Failure to train

We turn next to the question whether Pafford's allegations that DOL failed to properly train her constituted Title VII discrimination. Because Pafford has no direct evidence of discrimination in DOL's alleged failure to train, she must again rely on the indirect burden-shifting method of proof set out in *McDonnell Douglas*. Plaintiff has not identified and the Court has not found in its own research any Seventh Circuit case recognizing a claim under Title VII for a discriminatory failure to train. At least one district court in this circuit has addressed a failure-to-train claim, although it concluded that the plaintiff had not established a prima facie case because he did not establish that similarly situated employees received better training. *See Iovin v. Northwestern Memorial Hospital*, 916 F. Supp. 1395, 1407-09 (N.D. Ill. 1996).

In order to subject Pafford's failure-to-train claim to the indirect burden-shifting method of proof, we must again first determine the prima facie elements of such a claim. The Supreme Court recognized in *McDonnell Douglas* that the elements of a prima facie case will vary depending on the type of employment practice or decision challenged. 411 U.S. at 802 n.13, 93 S.Ct. at 1824 n.13. *See also Fredel v. City of Madison*, 832 F.2d 965, 972 (7th Cir. 1987); *Coates v. Johnson & Johnson*, 756 F.2d 524, 531 (7th Cir. 1985). Nevertheless all discrimination cases share certain general prima facie elements: (1) the plaintiff is a member of a protected class; (2) the plaintiff is otherwise similarly situated to persons outside her protected class; and (3) the plaintiff was treated differently than those other persons. *See, e.g., Cherry v. American Tel.*

& Tel. Co., 47 F.3d 225, 228 (7th Cir. 1995) (sex discrimination case); *Chambers v. American Trans Air, Inc.*, 17 F.3d 998, 1003-04 (7th Cir.), *cert. denied*, 115 S.Ct. 512 (1994) (sex discrimination case); *Washington v. Lake County, Illinois*, 969 F.2d 250, 256 (7th Cir. 1992), *abrogated on other grounds by McKennon v. Nashville Banner Pub. Co.*, ___ U.S. ___, 115 S.Ct. 879 (1995) (race discrimination case); *Collins v. State of Illinois*, 830 F.2d 692, 698 (7th Cir. 1987) (race discrimination case); *Ramsey v. American Air Filter Co., Inc.*, 772 F.2d 1303, 1307 (7th Cir. 1985) (race discrimination). In order for Pafford to establish a prima facie case of discriminatory failure to train, she must at least demonstrate each of these three elements. Pafford must also establish a fourth element: to wit, that any training that DOL failed to provide to Pafford was material to further promotion. *See, e.g., Iovin v. Northwestern Memorial Hosp.*, 916 F. Supp. 1395, 1407 (N.D. Ill. 1996) (noting lack of evidence that denial of request to attend seminar was significant factor in the plaintiff's job-performance).

A review of the evidence before the Court reveals that Pafford cannot establish a prima facie case of failure to train. Pafford makes numerous allegations in her Statement of Genuine Issues that arguably could be interpreted as allegations of a discriminatory withholding of training. Because of the repetitive and scatter-shot nature of Pafford's allegations, we are selective in our review and address only those allegations that merit consideration. For the reasons set forth below Pafford's alleged incidents of a discriminatory failure to train either do not satisfy the elements of a prima facie case or lack any

proper basis in evidence. We address seriatim these allegations and the evidentiary materials that are submitted in their support.

Pafford alleges that fellow compliance officer Charles McCormick, a white male, was permitted to attend a seminar on cases involving the Migrant and Seasonal Worker Protection Act ("MSPA"), but that Pafford was not permitted to go. (McCormick Aff., ¶ 6) Pafford also testifies that McCormick learned how to conduct more complicated investigations by going with the more advanced investigators on advanced investigations, whereas she was not so trained. Pafford Aff., ¶¶ 19-21) In regard to the MSPA seminar, Pafford cannot show that her inability to attend the seminar actually constituted a failure to train because she presents no evidence that attendance at the seminar was necessary for promotion to the GS-11 level, where in his affidavit McCormick states that MSPA cases are "Grade 12 type of cases." (McCormick Aff., ¶ 6) Pafford's affidavit evidence that McCormick was able to go with senior investigators while she was not also fails to raise a genuine issue of fact because Defendant has presented undisputed evidence that McCormick was not promoted to the GS-11 level and specifically was deemed not to be qualified for such a promotion. *See* Klipsch Aff., pp. 6-7; Wyzguski Aff., pp. 6-7. Therefore, Pafford cannot establish that any training that McCormick allegedly received which she did not receive was material to further promotion.

Much of the evidence that Pafford proffers as support for her discriminatory training claim suffers from the same shortcoming: it fails to establish the second element of the prima facie case; namely, that the training which

Pafford was denied was given to similarly situated employees outside of Pafford's protected group. Rather than demonstrate the existence of similarly situated employees who received better training, much of Pafford's evidence merely adverts to unnamed and unidentified "white" compliance specialists or "non-minority" compliance specials who received more favorable training. In his affidavit former coworker Manndujano Garcia stated, "In contrast to the other non-minority new officers, who were given encouragement and training, Ms. Klipsch exhibited a sink or swim attitude regarding Ms. Pafford and it was very apparent that she was providing a very hostile atmosphere for Ms. Pafford to work under, an atmosphere with no encouragement or support, and reprimand whenever possible." (Garcia Aff., ¶ 4) Pafford offers her own affidavit in which she testifies that "[w]hen white compliance officers were accompanied by a senior compliance officer, the senior officers assisted and trained the white less experienced officers," but that when Hooton accompanied her, Hooton did not assist her or cooperate with her, but rather criticized her. (Pafford Aff., ¶ 29) Pafford also testified that white compliance officers in general learned how to conduct more complicated investigations by going with the more advanced investigators on advanced investigations, whereas she was not so trained. (Pafford Aff., ¶¶ 19-21) Pafford testified that DOL restricted the time at work that she could spend on her cases by requiring her to serve as backup for technical assistance for the Wage and Hour Assistant when other employees were not so required, and by requiring her to alphabetize and file history cards when other employees were not so

required. (Pafford Aff., ¶ 52) "The alphabetizing and filing cut down on my time which I had to engage in law enforcement on my cases and training." *Id.* Vague and unparticularized references to "white," "nonminority," or "other" employees do not demonstrate that similarly situated employees received better training. such conclusory testimony is argument, not evidence. Other materials cited by Pafford do not even compare the training received by Pafford with the training received by anyone else, let alone someone similarly situated. For example, Aquila Crawford testified that Klipsch did not accept his offer to train Pafford for a higher grade and that later he was instructed to train Pafford for one day at S&K Contracting in the conducting of a single interview, which Crawford believed was a waste of time.

(Crawford Aff., ¶¶ 12-13) Pafford also alleges that Klipsch and Hooton specifically tried to make her fail. For example, Pafford testifies that, as part of her investigation of a particular business, Hooton did not give Pafford adequate directions to the business and that after Hooton met Pafford at the business "she left and gave me no training." (Pafford Aff., ¶ 23) Crawford testifies that he observed that "Ms. Klipsch and Ms. Hooton did not provide training to Ester [Pafford], but rather, treated her in a demeaning manner." (Crawford Aff., ¶ 17) Pafford also offers affidavit evidence that Hooton acted in a rude, mean, and disrespectful manner toward her. *See* Clumb Aff., ¶¶ 4-11; Nyorkor Aff., ¶ 2; Katz Aff., ¶ 4; McCormick Aff., ¶¶ 7-8. Pafford also testifies that Hooton instructed her to be trained by persons who were newer hires than she. (Pafford Aff., ¶ 53) None of these events or circumstances, however, creates a genuine issue of fact,

because even if such allegations were true, they would not raise an inference of discrimination without admissible evidence that similarly situated persons outside Pafford's protected groups received better training than Pafford.

Finally, Pafford cites Wyzguski's affidavit testimony and Klipsch's affidavit testimony in support of her claim. *See* Def.'s Ex. 3, 9. A review of these affidavits, however, reveals no support for Pafford's claim. Klipsch's affidavit provides no evidence that Pafford received less training than any similarly situated compliance specialist. Wyzguski's affidavit supports the opposite conclusion. For example, Wyzguski states:

> I told Ms. Pafford that, as circumstances permitted, I would accompany her on investigations. The opportunity never arose because of the press of other District Office business. However, I spent more time training Ms. Pafford than any other investigator in the District. We met regularly in the District Office to discuss her investigation files and I trained her in policies and procedures, including interviewing techniques and I answered her questions. Ms. Pafford was very demanding of my time as a supervisor. A GS-11 is expected to function independently and Ms. Pafford's constant questions evidenced her inability to perform on her own as the GS-11 status required. I was aware of stressful familial sutuations [sic] in Ms. Pafford's personal life and therefore I attempted to assist her in whatever way I could to be successful in her professional career.

(Wyzguski Aff., p. 5) Having failed to present any evidence that similarly situated employees received specific

training that she did not, Pafford cannot establish a prima facie of discriminatory training.

B. Retaliation

We turn now to Pafford's claim of retaliation. To survive summary judgment, Pafford must establish a prima facie case of retaliation, *see Johnson v. University of Wisconsin-Eau Claire*, 70 F.3d 469, 478 (7th Cir. 1995) (setting out *McDonnell Douglas* burden-shiffing method of indirect proof); *Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863, 868-69 (7th Cir. 1995) (same), by establishing: (1) that she engaged in statutorily protected expression; (2) that she suffered an adverse action by her employer; and (3) that there is a causal connection between the protected expression and the adverse action. *Johnson v. University of Wisconsin-Eau Claire*, 70 F.3d 469, 479 (7th Cir. 1995); *Dunning v. Simmons Airlines, Inc.*, 62 F.3d 863, 868-69 (7th Cir. 1995); *Koelsch v. Beltone Electronics Corp.*, 46 F.3d 705, 708 (7th Cir. 1995). As with an underlying claim of discrimination, once a plaintiff establishes a prima facie case, then the defendant has a burden of producing evidence of a nondiscriminatory reason for the adverse action. If the defendant meets this burden of production, the plaintiff must then prove by a preponderance of the evidence that the defendant's reasons were merely a pretext for discrimination. For simplicity of analysis, however, where the defendant comes forward with a nondiscriminatory reason for an adverse action which the plaintiff cannot demonstrate to be pretextual, a court may ignore the prima facie inquiry and decide that matter based on the defendant's proffered reason. *Cf. Sample v.*

Aldi, Inc., 61 F.3d 544, 548 (7th Cir. 1995) (where employer meets burden of production, whether plaintiff truly made out a prima facie case is irrelevant); *Holmberg v. Baxter Healthcare Corp.*, 901 F.2d 1387, 1391 (7th Cir. 1990) (where plaintiff did not meet burden of showing pretext, it is not necessary to decide whether plaintiff also established prima facie case); *See also E.E.O.C. v. Our Lady of Resurrection Med. Center*, 77 F.3d 145, 149-150 (7th Cir. 1996) (citing cases).

The difficulty with Pafford's retaliation claim is that it is not clear from her pleadings and submissions what actions she alleges to be retaliatory. In her Statement of Genuine Issues, submitted pursuant to Local Rule 56.1, Pafford identifies only two actions as being specifically retaliatory: the decision to have her searched for weapons every time she entered the U.S. Courthouse where she worked, *see* Pl.'s Statement of Genuine Issues, ¶¶ 53, 54, and the subsequent decision to terminate her employment, *see id.*, ¶ 86. Pafford makes one other allegation that arguably could be construed as an allegation of retaliation: DOL's refusal to allow Pafford to transfer to the Department's Atlanta regional office, *see id.*, ¶¶ 84-85. There are other allegations which we will not even subject to the prima facie standard because they involve, at most, petty conduct, *see, e.g., id.*, ¶¶ 68, 69, 74, or concern conduct that occurred prior to Pafford's complaint, *see, e.g., id.*, ¶ 62, or merely allude to some other form of discriminatory or unfair treatment which is unrelated to Pafford's complaint of failure to promote and which is not even facially related to Pafford's filing of a complaint, *see, e.g., id.*, ¶¶ 76-78, 80-81.

1. Weapons search

We turn first to Pafford's allegation that DOL retaliated against her by having her searched for weapons every time she entered the U.S. Courthouse where she worked. Even if Pafford were able to establish a prima facie case of retaliation, we believe that Defendant has offered a legitimate nondiscriminatory reason for instituting the search of Pafford: to wit, that Pafford's supervisors considered that Pafford might threaten the health and safety of her co-workers.

In the fall of 1991, Hooton told Wyzguski that she was concerned about her safety because of Pafford's behavior. (Def.'s Ex. 34, Wyzguski Dec. ¶ 4) Pafford's behavior also had caused Wyzguski concern for his own safety and the safety of the other employees at the Indianapolis office. (Wyzguski Dec. ¶ 7) For example, Pafford came into Wyzguski's office on several occasions and cried. (Pafford Dep. pp. 136-38, 226-27; Wyzguski Dec. ¶ 5) Pafford told Wyzcjuski that her husband was in the armed forces in the Gulf War in Saudi Arabia and that she thought he might be having an affair. (Pafford Dep. pp. 226-27; Wyzguski Dec. ¶ 5) Pafford's son also was serving in the Gulf War. (Pafford Dep. pp. ¶ 38-39; Wyzguski Dec. ¶ 5) Pafford told Wyzguski that she had contemplated suicide. (Wyzguski Dec. ¶ 5) Wyzguski had previously referred Pafford to the employee assistance program for counseling because of the apparent emotional difficulties she was having. (Wyzguski Dec. ¶ 6) Also at this time Pafford was on a leave restriction and had been experiencing ongoing performance problems and was serving a

15 day suspension for a series of conduct-related problems. (Wyzcjuski Dec. ¶ 6)

In addition to the foregoing, Wyzguski had heard that Pafford owned a gun and carried it with her in her car or on her person. (Wyzcjuski Dec. ¶ 6) Wyzguski's safety concerns were heightened by an incident contemporaneously reported in the news in which a postal employee in Michigan had shot and killed his supervisor, wounded fellow employees, and then committed suicide. (Wyzguski Dec. ¶ 7) Wyzguski also had heard news accounts of other work-related violence by employees. (Wyzguski Dec. ¶ 7)

Wyzguski discussed his safety concerns with his supervisor, Regional Administrator William Van Zanen. (Wyzguski Dec. ¶ 8) As a result of these discussions, Wyzguski and Van Zanen decided that in the interest of employee safety Pafford should be screened for weapons when she entered the U.S. Courthouse for work. (Wyzguski Dec. ¶ 8) The Courthouse entrances already were equipped with screening devices. (Wyzguski Dec. ¶ 8) Accordingly, on November 5, 1991, Wyzguski wrote to U.S. Marshal Ralph D. Morgan, stating that Pafford had been known to carry a handgun, and asked that she be checked when she entered the building to make sure she did not carry her handgun into t[illegible] Courthouse. (Wyzguski Dec. ¶ 9)

On November 20, 1991, Wyzguski notified Morgan that it no longer was necessary to search Pafford. (Wyzguski Dec. ¶ 9) After doing so, however, Wyzguski spoke with Klipsch concerning a variety of matters, including Pafford. (Wyzguski Dec. ¶ 10) Klipsch was

about to return to the Indianapolis District office as District Director. (Wyzguski Dec. ¶ 10) Wyzcjuski told Klipsch that he had requested that Pafford be screened for weapons but that he had recently halted the procedure. (Wyzguski Dec. 10) At Klipsch's request Wyzguski provided her with all the information he relied upon relating to the screening process. (Wyzguski Dec. ¶ 11) Shortly thereafter Wyzguski received a call from Dick McMahon, Deputy Regional-Administrator, Chicago. (Wyzguski Dec. ¶ 11) McMahon said that he had talked with Klipsch about the matter, that Klipsch was concerned about employee safety, and that the search should be reinstated. (Wyzguski Dec. ¶ 11) Accordingly, on November 27, 1991, Wyzguski asked that the screening procedure be reinstated. (Wyzguski Dec. ¶ 11)

Having offered a legitimate nondiscriminatory reason for instituting the searches of Pafford, Defendant shifts the burden to Plaintiff to show that the reason is in fact a mere pretext for discrimination. Pafford makes no such showing. *See* Def.'s Resp. Br., pp. 31-36. Pafford argues that Defendant should not have subjected her to the searches because it did not have a reasonable suspicion that she was committing a crime. *Id.*, pp. 31-32. This application of constitutional criminal analysis under the Fourth Amendment is misplaced. Pafford is not a criminal defendant. The question is whether DOL had a nondiscriminatory reason for searching her. Pafford also argues that four white employees that Klipsch identified as having performance problems were not subjected to searches. *Id.*, p. 32. Of course, even if this were true it would say nothing about the genuineness of Wyzguski's initial decision to commence the searches. While Pafford

contends that the decision to search her was unwarranted, the question is not whether Pafford actually posed a health or safety risk to her coworkers or whether searches were a good way of responding to such a threat but whether the persons responsible for subjecting Pafford to the searches honestly believed that she posed a risk. *Sample v. Aldi Inc.*, 61 F.3d 544, 549 (7th Cir. 1995) (plaintiff must create an issue as to "whether the employer honestly believed in the reasons it offers," not whether the employer made a bad decision); *Johnson v. University of Wisconsin-Eau Claire*, 70 F.3d 469, 480 (7th Cir. 1995) ("Johnson's subjective belief that the action was retaliatory and that the claimed reasons were pretext does not alone create a genuine issue of material fact"). Pafford suggests that Wyzguski was "afraid of minorities" and ordered the searches because of racial stereotyping but presents no admissible evidence to support her theory, only allegations and innuendo. *See* Pl.'s Resp. Br., p. 33. Pafford also argues that evidence that Klipsch played a role in reinstating the searches also somehow shows that the searches were retaliatory. In fact, such evidence only shows that Klipsch and Wyzguski differed in their assessment of the risk that Pafford posed to her coworkers. Klipsch's involvement in the decision to reinstate the searches does not, in itself, make the decision to search Pafford suspect. Consequently, Pafford does not meet her burden to raise a genuine issue as to whether the Defendant's stated reason for having instituted a weapons search against her was unworthy of credence and was merely a pretext for retaliation.

2. Termination of employment

Pafford next argues that the decision to terminate her employment was also an act of retaliation. Defendant, however, has presented a legitimate nondiscriminatory reason for Pafford's termination: her chronic absenteeism from work and her failure to follow directions. The following facts are uncontested.

In July of 1991 Hooton placed Pafford on a leave restriction. (Pafford Dep. pp. 147-48) As set forth in the memorandum advising Pafford of her leave restriction, between June 26, 1990, and July 11, 1991, Pafford used 266 hours of annual leave, 98 hours of sick leave, and 255 hours of leave without pay ("LWOP"). (Def.'s Ex. 23) This equates to approximately 78 work days in slightly over one year's time. Thus, Pafford was absent nearly 30% of the work time. Prior to receiving the leave restriction, Pafford had been counseled about excessive leave usage and the importance of dependability on the job. (Pafford Dep. p. 149)

The leave restriction stated that Pafford had used "excessive sick leave and other leave in lieu of sick leave," and that in the future each time Pafford took sick leave or annual leave in lieu of sick leave she would have to "submit a proper medical certificate immediately upon [her] return to duty." (Def.'s Ex. 23) The leave restriction further stated that the medical certificate had to be signed and state: (1) what period of time Pafford was under the physician's care; (2) Pafford's full and unabbreviated diagnosis; (3) Pafford's prognosis for a full recovery; and (4) whether the illness is chronic or recurring. (Def's. Ex. 23, pp. 2-3)

The leave restriction expressed Hooton's "strong concern" about Pafford's excessive use of leave and unscheduled absences. (Def.'s Ex. 23, p. 3) The leave restriction was to remain in effect for six months. (Def's. Ex. 23, p. 3) The memorandum also warned, "Excessive AWOL may lead to disciplinary/adverse action, up to and including possible removal from your position." (Dep. Ex. 23, p. 3) Pafford knew she had been missing a lot of work days, that it was important to follow the leave restrictions, and that if she didn't follow these restrictions she could lose her job. (Pafford Dep. pp. 154, 156)

On January 30, 1992, Hooton extended Pafford's leave restriction an additional six months. (Pafford Dep. pp. 175-76) Hooton extended Pafford's leave restriction on the grounds that since the July 30, 1991 leave restriction had been put in place, Pafford had been AWOL seven times for 51½ hours, almost all of which were for failure to provide the required medical documentation. (*Id.*)

On July 9, 1992 Pafford's husband delivered to Morrison a leave request for Pafford. (Pafford Dep. pp. 407-08; Pl.'s Ex. 19, p. 1) Pafford's leave request sought 520 hours of sick leave beginning on july 9, 1992. (Pafford Dep. p. 413) Pafford did not have 520 hours of available leave at the time she made this request, and she would have had to have taken leave without pay for the time requested. (Pafford Dep. pp. 413-14) In addition, this request was contrary to Pafford's leave restriction, which stated that she would not be granted advanced leave. (Def.'s Ex. 23, p. 2)

In response to this request, Morrison sent Pafford a letter advising her that he had audited her leave and that she did not have 520 hours of sick leave available. (Pl.'s Ex. 19, p. 1) Morrison's letter further stated, "Also, in accordance with you [sic] leave restriction, you will not be authorized further advanced leave or leave without pay. Also, since you do not have sick leave available as requested for 7/7/92, 1 must process a charge of AWOL for time absent from work on 7/7/92, 7/9, and 7/10/92. In addition, you will be charged AWOL until you return to duty." (*Id.*, pp. 1-2)

On July 24, 1992, Morrison wrote to Pafford concerning various matters, including the fact that Pafford had left files she was working on in her locked briefcase under her desk while she was AWOL. (Pafford Dep. pp. 416-18; Def.'s Ex. 46) Pafford had the keys to the briefcase. (Pafford Dep. p. 418) As of September 2, 1992, these files remained locked in Pafford's briefcase, some of which involved complaints that were more than a year old. (Pafford Dep. pp. 420-21; Def.'s Ex. 47)

On September 2, 1992, Morrison sent Pafford notice of her proposed removal based upon her being AWOL and failing to follow instructions. (Pl.'s Ex. 23) Morrison cited the following as examples of Pafford's absences without leave: one hour on May 15, 1992; two hours on June 19, 1992; eight hours on June 24, 1992; seven hours on July 7, 1992; and, with the exception of three hours of work on July 17, 1992, a continual absence from July 9, 1992 through the date of the notice. (*Id.*) Pafford's proposed removal for failure to follow instructions was based in part upon Pafford's failure to adhere to her leave restriction, her practice of working at home even though

she had been told not to, and Pafford's failure to timely turn over the files she had locked in her briefcase. (*Id.*)

On September 27, Pafford requested 512 hours of sick leave. (Pl.'s Ex. 27) The 512 hours was Pafford's estimate of how many hours of leave she would need, after talking to her doctor. (Pafford Dep. pp. 448-49) At the time she made this request, Pafford did not have 512 hours of accumulated leave. (Pafford Dep. p. 449)

The medical documentation Pafford submitted in connection with her leave requests of 520 and 512 hours consisted of three documents. First, on June 26, 1992, Pafford's doctor, John Steenbergen, wrote a letter "To Whom It May Concern" in which he stated that he advised Pafford to take a leave of absence to reduce her stress level. (Pafford Dep. p. 437; Pl.'s Ex. 16) Second, on July 7, 1992, Pafford was seen by Dr. S. Schmidt Burke, who stated that Pafford could return to work when released by Steenbergen. (Pafford Dep. pp. 439-40; Pl.'s Ex. 18) Finally, on September 3, 1992, Steenbergen wrote another letter "To Whom It May Concern" stating that Pafford should take an additional three-month leave of absence. (Pl.'s Ex. 25)

Pafford was still under the leave restriction at the time she submitted these leave requests. (Pafford Dep., p. 449) The documentation Pafford submitted in connection with these requests did not comply with Pafford's leave restriction. For example, Steenbergen's letters do not state Pafford's prognosis for a full recovery or whether any special precautions should be taken upon her return to work. – (Pl.'s Exs. 16, 25) In fact, Steenbergen's June 26 letter merely states that Pafford should take a leave of

absence and does not specify how long this leave should last. (Pl.'s Ex. 16) Similarly, Schmidt-Burke's letter states only that Pafford could return to work when released by her other doctor. (Pl.'s Ex. 18)

On October 28, 1992, Klipsch issued a decision removing Pafford from employment effective November 6, 1992. (Pafford Dep. p. 427; Pl.'s Ex. 32) (Pafford's last day in the Indianapolis office of the DOL, however, was July 7, 1992. (Pafford Dep. p. 408)) As set forth in Klipsch's decision, Pafford did not dispute (other than by filing an EEO charge) many of the allegations against her in Morrison's September 2 notice of proposed removal. (Pafford Dep. pp. 427-28; Pl.'s Ex. 32, p. 1)

In her response brief Pafford argues that the decision to terminate her was unjustified and retaliatory. She does not, however, offer any evidence that the decision to terminate her was based on anything other than her truancy from work and her refusal to follow directives. Instead, Pafford again relies on opinion and conclusory statements. *See* Pl.'s Resp. Br., pp. 62-64. For example, Pafford states that white employees in her situation would not have been terminated. *See Id.*, p. 62. The only evidence that Pafford cites is her own self-serving affidavit in which she describes how white employees were given much greater allowance in taking leave from work. *See* Pafford Aff., ¶¶ 104-105. Pafford's testimony, however, is more argumentative than evidentiary and does not appear to be made upon personal knowledge. Consequently, Pafford's statements concerning how DOL may have treated other employees' requests for leave is inadmissible. *See* Fed. R. Evid. 602. Pafford also states that in his September 2, 1992 memorandum Morrison "doubled

up" the charges against her by charging her both with being absent without leave and with failing to following [sic] directives for the same offending conduct. Pafford's contention does not in itself suggest that the ultimate decision to terminate her was in any way pretextual; rather it suggests that Morrison found some of Pafford's conduct to transgress, at least for descriptive purposes, more than one rule. Consequently, Pafford does not present any evidence showing the existence of a factual dispute as to whether the reasons offered by DOL for terminating Pafford were merely a pretext for retaliating against her.

3. Failure to transfer

Pafford's last apparent allegation of retaliation is that DOL refused to recommend Pafford for a transfer to the Department's Atlanta regional office. *See* Pl.'s Statement of Genuine Issues, ¶¶ 84-85. Pafford contends in her response brief as follows:

> The Memphis and Nashville offices had expressed interest in receiving Ms. Pafford, in spite of the facts of discrimination and proposed termination. It is true that those offices did not absolutely promise a transfer to Ms. Pafford, but if Ms. Klipsch had just approved the sending of Ms. Pafford to Memphis, the receiving end could have accepted her. Ms. Klipsch blocked Mr. [sic] Pafford's transfer.

(Pl.'s Resp. Br., pp. 61-62) Plaintiff suggests that Klipsch's decision not to recommend Pafford for a transfer was the result of some retaliatory animus. However, in her

November 5, 1992 letter to Pafford, Klipsch gave a legitimate, nondiscriminatory reason for not recommending her.

> In response to your October 31, 1992 memorandum which I received on November 3, 1992, please be advised that your request for transfer to the Memphis Area Office within 72 hours of your request cannot be granted by me. I could not grant this request even if you had requested a transfer in a reasonable time period because the request exceeds the scope of my authority for personnel transactions, which is limited to the Indianapolis District Office. I must also question the good faith of your request in light of the fact that Mr. Perry's memorandum of October 30, 1992 indicates there are no openings in his region, you have been absent without leave for almost four months, and your removal from Federal Service is scheduled for November 6, 1992.

(Pl.'s Ex. 40) Pafford contends that Klipsch was giving her the "run-around," *see* Pl.'s Resp. Br., p. 61, but otherwise does not present even a shadow of evidence that Klipsch's stated reasons for not recommending Pafford are not worthy of credence or are a mere pretext for a retaliatory animus. Consequently, Defendant is entitled to summary judgment on Pafford's retaliation claim.

C. Appeal of the MSPB decision

In addition to her Title VII claim, Pafford also appeals an April 13, 1993 decision of the Merit Systems Protection Board. The Merit Systems Protection Board is an independent, quasi judicial federal administrative

agency established to review civil service decisions. *See* 5 U.S.C. § 7701; *McAdams v. Reno*, 64 F.3d 1137, 1141 (8th Cir. 1995). The Board was established by the Civil Service Reform Act of 1978 ("CSRA"), Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.), which elaborated a comprehensive framework for handling the complaints of civil service employees faced with adverse personnel decisions. *Ayrault v. Pena*, 60 F.3d 346, 347 (7th Cir. 1995). An employee who wishes to complain of an adverse personnel decision must first appeal to the MSPB. 5 U.S.C. §§ 7513(d), 7701(a); *Pena*, 60 F.3d at 348. The forum in which an employee seeks judicial review of a decision of the MSPB depends on the nature of the complaint.

Petitions for review of MSPB decisions regarding nondiscrimination claims are filed in the Court of Appeals for the Federal Circuit. *See Williams v. Rice*, 983 F.2d 177, 179 (10th Cir. 1993); *Morales v. Merit Systems Protection Board*, 932 F.2d 800, 801-02 (9th Cir. 1991); 5 U.S.C. § 7703(b)(1). Where the alleged basis for the adverse personnel decision is discrimination in violation of Title VII, the Fair Labor Standards Act of 1938, the Rehabilitation Act of 1973, or the Age Discrimination in Employment Act of 1967, the petitioner may seek judicial review of the MSPB decision in the district court with a trial de novo. *See* 5 U.S.C. § 7703(b)(2) and (c); *Blaney v. United States*, 34 F.3d 509, 511 (7th Cir. 1994); *Williams*, 983 F.2d at 179. Where the MSPB decides a case combining both discrimination and nondiscrimination claims, the entire "mixed case" is filed in the district court, which

reviews the nondiscrimination claims on the administrative record and the discrimination claims de novo. *Crawford v. Runyon*, 37 F.3d 1338, 1340 (8th Cir. 1994); *Morales*, 932 F.2d at 801-02; *Barnes v. Small*, 840 F.2d 972, 978-79 (D.C. Cir. 1988). In its consideration of a nondiscrimination claim, the district court may set aside the administration adjudication only if it is arbitrary or capricious, obtained without compliance with lawful procedures, unsupported by substantial evidence or otherwise not in accordance with law. *Morales*, 932 F.2d at 801-02; *Barnes*, 840 F.2d at 979; 5 U.S.C. § 7703(c) (setting out analogous standard for review by Federal Circuit).

A problem with Pafford's appeal of the Board's decision is that she does not inform the Court of the nature of the Board's decision or of the personnel action she is contesting. Nor does she proffer any evidentiary material, such as the administrative record, from which the Court could at least deduce the nature of the contested personnel action and of the Board's decision. In her district court complaint, Pafford merely alleges that "[o]n April 13, 1993, a decision of the Merit Systems Protection Board became final, and Ester [Pafford] was advised by the Merit Systems Protection Board that she could file a civil action to review the decision within thirty days of that date, which she is hereby doing pursuant to the instructions." (Third Amended Complaint, ¶ 83) To the extent that Pafford is appealing a claim of discrimination, her appeal is subsumed by her Title VII claim. The Court does not revisit the issue under the guise of a separate appeal from the MSPB. *See Crawford*, *Morales*, and *Barnes*, *supra*.

The Court could review a Board decision in regard to a nondiscrimination claim if Pafford indeed raised one before the Board. However, we do not know what nondiscrimination claim, if any, Pafford brought before the Board. While Defendant appears to have submitted a copy of the administrative record, *see* Def.'s Ex. 61, we are not required to sift through the record to determine whether Pafford raised any nondiscriminatory claim that we could review independent of our consideration of Pafford's Title VII claim. Even if Pafford intended to appeal any such nondiscrimination claim, she clearly has not meet [sic] her burden of showing that any such claim was arbitrary or capricious, obtained without compliance with lawful procedures, unsupported by substantial evidence or otherwise not in accordance with law. 5 U.S.C. § 7703(c). Pafford's response brief does not reveal the existence of any nondiscrimination claim. Instead, she merely echoes the arguments she makes in the portion of her brief dedicated to her Title VII claim. *See* Pl.'s Resp. Br., p. 75. Consequently, Pafford fails to demonstrate that any decision of the Board in regard to a nondiscriminatory claim merits reversal.

III. Conclusion

Plaintiff Ester V. Pafford has not presented sufficient evidence to establish a prima facie case of discrimination by Defendant U.S. Department of Labor for failure to promote or for failure to train in violation of Title VII because she has not presented any material of suitable evidentiary quality regarding similarly situated individuals who were treated better than she. Even if Pafford had established a prima facie case of failure to promote,

Defendant U.S. Department of Labor has produced a legitimate nondiscriminatory reason why she was not promoted, namely that she was not qualified, which Pafford has failed to demonstrate to be pretextual.

The Court does not reach the issue of whether Plaintiff has established a prima facie case of discriminatory retaliation in violation of Title VII. The Court does, however, find that Defendant has produced legitimate nondiscriminatory reasons for the adverse actions Plaintiff alleges she was subjected to. Pafford has failed to establish by any reliable evidence that these reasons were mere pretexts for retaliation.

Finally, Pafford appeals a decision of the Merit Systems Protection Board without informing the Court of the precise nature of the adverse personnel action that she is contesting. To the extent that Pafford's administrative claim before the Board is for discrimination or retaliation in violation of Title VII, Pafford has no right of appeal separate from her instant Title VII claims. To the extent that Pafford appeals a Board decision on a nondiscrimination claim, she has failed to demonstrate that the Board's decision was arbitrary or capricious, obtained without compliance with lawful procedures, unsupported by substantial evidence or otherwise not in accordance with law.

Accordingly, the Court enters summary judgment in favor of Defendant U.S. Department of Labor and against Plaintiff Ester V. Pafford.

It is so ORDERED this 27th day of November 1996.

/s/ Sarah Evans Barker
SARAH EVANS BARKER,
CHIEF JUDGE
United States District Court
Southern District of Indiana

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STATUTORY PROVISIONS INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), provides as follows:

(a) Employment practices

It shall be an unlawful employment practice for an employer –

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 704(a) of Title VII of the Civil Rights act of 1964, 42 U.S.C. § 2000e-3(a), provides as follows:

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any

individual, or for a labor organization to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.